

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. SLATER and BANK OF ALASKA, a Corporation,

Appellants,

vs.

E. LATHROP and ALICE JOHNSON,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Third Division.

FILED

FEB 6 1921

F. D. MONCKTON,
CLERK

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H. A. SLATER and BANK OF ALASKA, a Corporation,

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vs.

A. E. LATHROP and ALICE JOHNSON,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Names and Addresses of Attorneys of Record.

Mr. EDWARD F. MEDLEY, of Cordova, Alaska,
Mr. B. O. GRAHAM, of Cordova, Alaska,

Attorneys for the Defendants and Plain-
tiffs in Error.

Messrs. DONOHUE & DIMOND, of Valdez,
Alaska,

Attorneys for the Plaintiff and Defend-
ants in Error. [1*]

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

*Page-number appearing at foot of page of original certified Transcript
of Record.

Amended Complaint.

Come now the above-named plaintiffs and after leave of the Court first had and obtained, file this their amended complaint, and for cause of complaint against the above-named defendants, allege as follows:

1.

That each of said plaintiffs are citizens of the United States and residents and inhabitants of the town of Cordova, Territory of Alaska, and each owns real property in said town of Cordova. That each of said plaintiffs is particularly damaged in a manner special and different from the damage to the general public of the town of Cordova by the acts committed by the above-named defendants and hereinafter set forth. That plaintiffs bring this action to protect their own rights and for and on behalf of the general public of the said town of Cordova.

2.

That the Bank of Alaska is a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska.

3.

That plaintiff A. E. Lathrop is the owner of Lots Nos. 23, 24, and 25, in block 2 of the town of Cordova, which property abuts on the westerly side line of First Street in the town of Cordova, the same being the principal business street of said town, and at great cost has erected on said property a large building. That in said building this

plaintiff nightly operates a motion-picture theatre, and also rents a number of stores for the conduct of mercantile businesses, and on the two upper floors of said building rents numerous offices and apartments. That the town of Cordova maintains a cross-walk across First Street from the westerly terminus of Burkhart Alley, hereinafter described, to the entrance of this plaintiff's theatre, and to the entrance of his building by which the upper floors of [2] said building are reached, and to the mercantile stores on the ground floor of said building. That a large number of the patrons of this plaintiff's theatre and customers of his tenants conducting mercantile stores in said building, and a large number of his tenants in the upper floors of said building, reach the same by way of and through Burkhart Alley and over said cross-walk. That if the the defendants are permitted to obstruct the said Burkhart Alley and close the same to the travel of the general public and to this plaintiff, said cross-walk will be removed by the municipal authorities of the town of Cordova, and this plaintiff will lose a large portion of his patronage to his motion-picture theatre, and his tenants conducting mercantile businesses on the ground floor of said building will lose a number of their customers, and the upper two floors of said building will be rendered less accessible for the tenants of his offices and apartments, thereby reducing the rental values of said building and this plaintiff's income therefrom, and will greatly depreciate the value of this plaintiff's said build-

ing, and this plaintiff will thereby suffer great and irreparable injury and loss.

4.

That plaintiff Alice Johnson is the owner of Lot 25 in Block 7 of said town of Cordova, which said lot lies along the southerly side of Burkhart Alley, hereinafter described. That the easterly end of said lot abuts on the westerly side line of Second Street of the said town of Cordova. Said lot extends from Second Street in a westerly direction to the regular alley running north and south through the center of Block 7. That this plaintiff has upon said lot a three-story building used by her as an apartment house. That the only entrance to her said apartments is off Burkhart Alley. That at the time this plaintiff purchased said lot, to wit, on the 8th day of July, 1918, said Burkhart Alley was and for a great many years theretofore had been an open public way and was being and had been continually used by the public as such, and this fact was one of the considerations that induced plaintiff to purchase said lot and premises. That if the defendants are permitted to obstruct the said Burkhart Alley and close the same to the travel of the general public and to the use of this plaintiff as hereinafter described, this plaintiff will suffer great and irreparable injury and loss, in that the tenants of said building occupying the various apartments will be thereby prevented from having free egress and ingress [3] to and from said building and the business portions of said town of Cordova, and the rental

value of the apartments in said building will be thereby greatly reduced, if not entirely destroyed, and the value of said premises will be reduced at least 50%.

5.

That on or about the month of May, 1908, the tract of land now covered by the said town of Cordova was surveyed for townsite purposes and laid off in lots and blocks, streets and alleys, and a map and plat thereof was on the twenty-second day of May, 1908, recorded in Book One at page ten of Maps and Plats, in the Cordova Recording Precinct, Territory of Alaska, which said map and Plat shows the said Block Seven to contain lots numbered from One to Sixteen, inclusive, abutting on the easterly side of First Street, and lots numbered from Seventeen to Thirty-two, inclusive, abutting on the westerly side of Second Street. There is and was an alley twenty feet wide extending northerly and southerly thru the center of the said block. That during the years 1908 and 1909 the original owners of the townsite of Cordova sold to the general public practically all of the lots in said townsite of Cordova as shown by said map and plat and a great number of buildings have been erected on said lots, and at the time of the acts committed by the defendants herein-after set forth in said town of Cordova had a population of between two and three thousand people.

6.

That in the summer of the year 1908 Lot No.

Seven (7) in Block No. Seven (7) of the said town of Cordova, was owned by Robert Ashland; Lot No. 8 (8) in Block No. 7 (7) was owned by A. E. Burkhart; Lot No. Twenty-five (25) in Block No. Seven (7) was owned by A. E. Burkhart; Lot No. Twenty-six (26) in Block No. Seven (7) was owned by M. Finkelstein. That at said time the owners of said lots were about to erect buildings on their respective lots and they then and there agreed to open an alley eight feet wide from First Street to Second Street in said town of Cordova, the center of said alley running along the dividing line between Lots Nos. Seven and Eight and Lots Nos. Twenty-five and Twenty-six in Block Seven of the said town of Cordova. That the then owners of Lot Seven and Lot Twenty-six in Block Seven gave four feet of their said lots along the southerly side thereof for said alley and the then owners of Lots Eight and Twenty-five of said Block Seven gave four feet [4] along the northerly side of their said lots for said alley. That said alley thereupon became known and ever since has been known and called Burkhart Alley. That shortly after said agreement the owners of the said four lots, heretofore described, erected buildings on their said respective lots, the side-walls of said buildings being four feet from the side line of said lots, thus leaving a public way eight feet wide from First Street and Second Street; that when the said owners of said lots erected buildings on their respective lots, they made various and many entrances into said buildings from Burkhart Alley

and in all manner treated said Burkhart Alley as a public highway. At the time said alley was opened up, it was agreed between the owners of said four lots that of the four-foot strip given by A. E. Burkhart for said alley along the northerly side of Lot 25 about 18 inches thereof should be used for the walk following the grade of the alley, and the remaining $21\frac{1}{2}$ feet should be used for higher walks, not following the grade of the alley, but on the levels of the floors of the buildings erected on said Lot 25, so that the occupants in the apartments of said buildings might conveniently reach the same from said alley. That said Burkhart Alley as it was originally opened up and has ever since been used and maintained, is more fully shown and described upon the plat attached to this complaint, marked Plaintiff's Exhibit "A" and made a part of this complaint.

7.

That as soon as said alley was opened as aforesaid, to wit, about the month of October, 1908, the same was used by the general public as a public highway and ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs until the acts of the defendants, hereinafter set forth, prevented them from so using a portion of it as a public highway.

8.

That on the fourteenth day of July, 1909, the municipality of the town of Cordova was duly in-

corporated and organized and the first meeting of the duly elected common council was held on said day; that from said day until the present time the 'said common council of the municipality of Cordova has exercised rights of ownership and authority, and control over the said Burkhart Alley without hindrance, objection, or permission of anyone whomsoever; that said common council has provided for the lighting of said [5] alley during all of said time, has supervised and required the same to be kept in good repair, has caused fire hydrants to be placed opposite the intersection of said alley with First and Second Streets, the same as has been done at the intersection of all other public streets in the said town of Cordova; has erected and maintained a good and substantial cross-walk from the westerly side of First Street to the westerly terminus of the said Burkhart Alley; has maintained a cross-walk for Burkhart Alley where the same crosses the regular alley running north and south through the center of Block Seven, and by numerous and various other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time.

9.

That at no time since said Burkhart Alley was opened as a public thoroughfare, as hereinbefore described, have the owners of any of the four lots abutting on said alley ever claimed or contended that said alley was not a public highway, excepting the defendants herein, and the first assertion of

rights in said alley was made by defendant H. A. Slater on the eight day of August, 1919; and the first assertion of any right in said alley by the defendant, the Bank of Alaska, was on or about the 10th day of September, 1919; that at the time of the opening of said alley as aforesaid, and many times since, A. E. Burkhart, then the owner of Lots Nos. Eight and Twenty-five, which lie along the southerly side of the said alley, has stated to the general public and to various and numerous persons, residents, and property owners of the said town of Cordova, that Burkhart Alley was a public thorofare and could not be closed by anyone.

10.

That the defendant H. A. Slater became the owner of Lot 7 in Block 7 of said town of Cordova in the latter part of the year 1917. That the defendant, The Bank of Alaska, became the owner of Lot 8 in Block 7 of said town of Cordova in the year 1918. That at the time each of said defendants purchased their respective lots the said Burkhart Alley was a public highway and had been continuously used by the general public since the year 1908 as a public highway, and said defendants and each of them purchased their respective lots with full knowledge that said Burkhart Alley was then being used as a public highway, and purchased said lots subject to the easement created by said Burkhart Alley upon and over the southerly four feet of said Lot 7 and over and upon the northerly four feet of said Lot 8 in Block 7 of said town of Cordova. [6]

11.

That on the 8th day of August, 1919, the defendant, H. A. Slater, then being the owner of Lot No. 7 in Block No. 7 of the town of Cordova, did unlawfully and without right or authority obstruct the free use and enjoyment of Burkhart Alley as a public thoroughfare, and prevented a portion of said alley from being used as a public thoroughfare, and prevented these plaintiffs from the free use and enjoyment of said Burkhart Alley, and prevented the general traveling public and citizens, residents and inhabitants of the town of Cordova from the free use and enjoyment of a portion of said Burkhart Alley as a public highway by fencing off and enclosing four feet of the northerly side of Burkhart Alley extending from First Street to the rear of Lot 7 in Block 7, a distance of 100 feet. That said defendant H. A. Slater from the 8th day of August, 1919, and until on or about the 10th day of September, 1919, did maintain the said fence and enclosure and prevented the use of that portion heretofore described of Burkhart Alley from being used as a public highway. That on or about the 10th day of September, 1919, and after this suit had been commenced the defendant H. A. Slater removed said fence from that portion of said Burkhart Alley, and the defendant the Bank of Alaska immediately erected said fence enclosing the southerly four feet of said Burkhart Alley commencing at First Street and extending a distance of 100 feet to the rear of Lot 8 in said Block 7 of the town of Cordova. That each of said defend-

ants unlawfully claim that the land occupied by said Burkhart Alley, as the same passes over and upon lots 7 and 8 in said Block 7, is their private property, and each of said defendants threaten to and intend to permanently obstruct and close said Burkhart Alley from First Street to the rear of Lots 7 and 8, a distance of 100 feet, and threaten to and intend to prevent these plaintiffs and the general public of the town of Cordova from occupying, using or enjoying said Burkhart Alley as a public thoroughfare, and unless each of said defendants are enjoined by this Court, said defendants and each of them will obstruct and close said Burkhart and will prevent these plaintiffs and the general public of said town of Cordova from the free use and enjoyment of said Burkhart Alley.
[7]

12.

That if these defendants are, or either of them is, permitted to so obstruct and close said Burkhart Alley and to so prevent these plaintiffs and the general public of the town of Cordova from the free use and enjoyment of said portions of Burkhart Alley hereinbefore described, these plaintiffs will suffer great and irreparable injury and loss in their property rights, and the said traveling public of said town of Cordova will suffer great inconvenience and loss and damage.

13.

That more than 10 years have elapsed since said Burkhart Alley was laid out and first used as a public street. During all of said time said Burk-

hart Alley has continuously and without interruption been used by the inhabitants and residents and general public of the town of Cordova as a public street or alley without permission or objections or hindrance by anyone whomsoever.

14.

That plaintiffs have no plain, speedy, or adequate remedy at law.

WHEREFORE, plaintiffs pray this Honorable Court to decree as follows:

FIRST. That said defendants and each of them be restrained and enjoined, pending the final determination of this suit, from in any manner obstructing or fencing in any portion of the said Burkhart Alley, and that they and each of them be required, pending the final determination of this suit, to remove any and all obstructions placed by them or either of them in or upon said Burkhart Alley. And that they and each of them be required to restore to the public the free use of said alley as a public thoroughfare.

SECOND. That upon the final determination of this action, the said defendants and each of them be perpetually enjoined from in any manner obstructing the free use of said Burkhart Alley as a public street or alley for its entire width and for its entire length as laid out and used by the general public from the time it was first opened up in the year 1908. [8]

THIRD. That plaintiffs have judgment against the defendants and each of them for their costs and disbursements incurred in this action.

FOURTH. That plaintiffs have such other and further relief as to the Honorable Court may seem just and equitable in the premises.

DONOHUE & DIMOND,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

A. E. Lathrop and Alice Johnson, being first duly sworn, depose and say: That they are the plaintiffs named in the foregoing amended complaint and that they have read said amended complaint and know the contents thereof, and the same is true as they verily believe.

A. E. LATHROP.
ALICE JOHNSON.

Subscribed and sworn to before me this 28th day of September, 1919.

[Notarial Seal] ANTHONY J. DIMOND.
Notary Public for Alaska.

My Commission expires February 13, 1921.

Service of the foregoing amended complaint is hereby accepted this 29th day of September, 1919.

EDWARD F. MEDLEY,
B. O. GRAHAM,
Attorneys for the Defendants.

Filed in the District Court, Territory of Alaska, Third Division. Sep. 29, 1919. Arthur Lang, Clerk. By C. H. Wilcox, Deputy. [9]

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA,
Defendants.

Answer.

Come now the above-named defendants and for their answer to plaintiffs' amended complaint, admit, deny and allege as follows:

1.

Admit that the plaintiffs are citizens of the United States and residents and inhabitants of the town of Cordova, Territory of Alaska, and that they own real property in said town of Cordova. The defendants deny each and every other allegation, matter and thing contained in paragraph numbered one of plaintiffs' amended complaint.

2.

Admit paragraph numbered two of plaintiffs' amended complaint.

3.

Defendants deny that plaintiff A. E. Lathrop is the owner of lot twenty-three or of lot twenty-five in block number two of the town of Cordova. Defendant admits and alleges that plaintiff A. E. Lathrop operates a moving-picture theatre seven

nights each week in the building located on lots twenty-three, twenty-four and twenty-five in block number two of the town of Cordova, Alaska. Defendants deny that a large number of patrons of plaintiff's theatre, or customers of his tenants conducting mercantile stores in said building, or that a large number of his tenants in the upper floors of said building reach said building by way of or through said so called Burkhart Alley, but allege the fact to be that said Burkhart Alley is not now and has never been used to any material extent by any of the persons referred to in paragraph numbered three of plaintiffs' amended complaint or by the public generally or except by persons having occasion to use the side entrances of defendants' buildings, denies that the [10] cross-walk traversing First Avenue opposite the so-called Burkhart Alley will be removed by the municipal authorities of the town of Cordova or by anyone else if said so-called Burkhart Alley be closed, and deny that plaintiff A. E. Lathrop will lose a large portion or any portion of his patronage to his said motion-picture theatre, deny that his tenants conducting business on the ground floor of said building will lose a number of their customers or any of their customers, deny that the two upper floors of said building will be rendered less accessible for the tenants of his offices or apartments, deny that the rental values of said building or that plaintiff's income therefrom will be reduced, deny that the value of plaintiff's said building will be greatly depreciated or depreciated at all, and deny that

plaintiff will suffer great or irreparable injury or loss or any injury or loss by the closing of that portion of said so-called Burkhart Alley between lots seven and eight of said block seven.

4.

Answering paragraph numbered four of plaintiff's amended complaint, defendants deny that plaintiff Alice Johnson is the owner of lot twenty-five in block seven of said town of Cordova; and deny that the only entrance to said apartments is from said so-called Burkhart Alley, and allege that said building in which said apartments are located fronts on said Second Street of said town of Cordova and abuts upon the alley running north and south through said block seven, and that entrances from said Second Street and said north and south alley to said building now exist and have existed for a long time past; defendants deny that at the time plaintiff Alice Johnson purchased said lot twenty-five in block seven of said town of Cordova said Burkhart Alley was or ever has been an open public way; deny that said so-called Burkhart Alley was at said time or ever had been used by the public as a public way and deny that plaintiff Alice Johnson was induced to purchase said lot and premises by a continual public use of said so-called Burkhart Alley or any public use thereof. Defendants deny that if they obstruct or close that portion of said so-called Burkhart [11] Alley which lies between lots seven and eight in said block seven, said Alice Johnson will suffer great

and irreparable injury or loss or any injury or loss, and deny that the tenants of said building will be prevented from having free egress and ingress to and from said building and the business portion of said town of Cordova. Defendants deny that the rental value of the apartments of said building will be greatly reduced or reduced to any extent and deny that the value of said premises will be reduced fifty per cent or at all by the closing of that portion of said so-called Burkhart Alley lying between said lots seven and eight.

5.

Defendants admit the allegations contained in paragraph numbered five of said amended complaint.

6.

Answering paragraph numbered six of said amended complaint defendants deny that in the summer of the year 1908 or at any time the owners of said lots seven and eight and twenty-five and twenty-six in said block seven agreed to open an alley eight feet wide or of any width from First Street to Second Street in said town of Cordova, as alleged in paragraph numbered six of said amended complaint, or at all. Defendants deny that the owners of lot seven and lot twenty-six in said block seven or either of them ever gave four feet of their said lots or either of them for such alley and deny that the owners of lots eight and twenty-five of said block seven or that either of such owners ever gave four feet or any part of their said lots for said alley. Defendants deny that the

side-walls of the buildings erected by the owners of said lots seven and eight were constructed four feet from the side line of said lots, but allege that said buildings were erected with the side walls meeting and joining on the property line between said lots seven and eight, as such property line is shown on the plat and map of said town of Cordova, referred to and described in paragraph numbered five of said amended complaint, leaving a hallway on the street level through the buildings now owned by the defendants extending from First Street to the alley running north and south through said block seven, which hallway was left for the purpose of providing, and did provide side entrances [12] on the street level to said buildings on said lots seven and eight. Defendants deny that the buildings erected on said lots seven and eight were so constructed as to leave a public way eight (8) feet wide or of any width extending from First Street to Second Street, and deny that the owners of said lots were seven and eight at any time, in any manner, treated said hallway as a public highway. Defendants deny that it was ever agreed upon between the owners of said four lots or any of them that the four (4) foot strip referred to in said paragraph numbered six as having been given by A. E. Burkhart for said alley along the northerly side of lot twenty-five or any part thereof should be used for a walk on the levels of the floors of said building erected on said lot twenty-five.

7.

Answering paragraph numbered seven of said

amended complaint, defendants deny that said hallway through said buildings on said lots seven and eight was ever used by the general public or by the plaintiffs as a public street, alley or highway; but defendants allege that they and their predecessors in interest have at all times since the construction of their said buildings exercised dominion, possession and control over said hallway and have treated the same as a private property, paid taxes thereon and have been in open, notorious and exclusive possession thereof at all times since said buildings were erected.

8.

Answering paragraph numbered eight of said amended complaint defendants deny each and every allegation, matter and thing therein contained, except that on or about the fourteenth day of July, 1909, the municipality of the town of Cordova was duly incorporated and organized and the first meeting of the duly elected common council was held on said day, and that said municipality caused fire hydrants to be placed in First Street and Second Street at points approximately opposite said hallway which abuts upon First Street and the open space between said lots twenty-five and twenty-six which abuts upon Second Street.

9.

Answering paragraph numbered nine of said amended complaint, defendants deny each and every allegation therein contained, [13] except that on or about the eighth day of August, 1919, defendant H. A. Slater erected a fence or barrier

along the property line between said lots seven and eight and through said hallway, and that on or about the tenth day of September, 1919, defendant, Bank of Alaska, placed a fence or barrier along said property line between said lots seven and eight.

10.

Answering paragraph numbered ten of said amended complaint, defendants deny each and every allegation therein contained, except that the defendant H. A. Slater became the owner of lot seven of the said town of Cordova in the latter part of the year 1917, and that the defendant Bank of Alaska became the owner of lot eight in block seven in said town of Cordova in the year 1918.

11.

Answering paragraph numbered eleven of said amended complaint, defendants admit that at the times specified in said paragraph said hallway was obstructed by defendants in the manner alleged by plaintiffs but deny that such obstruction was unlawful or without right or authority and deny that defendants unlawfully claim the land occupied by said hallway as their private property, and defendants deny that the general public or the plaintiffs in this action have any right or authority to use said hallway as a public thoroughfare.

12.

Answering paragraph numbered twelve of said amended complaint, defendants deny each and every allegation, matter and thing therein contained.

13.

Answering paragraph numbered thirteen of plaintiffs' amended complaint, defendants deny that said so-called Burkhart Alley was ever laid out or used as a public street and deny each and every other allegation, matter and thing contained in said paragraph.

14.

Answering paragraph numbered fourteen of said amended complaint, defendants deny that plaintiffs are entitled to any remedy at law or in equity.
[14]

WHEREFORE, defendants having fully answered plaintiffs' amended complaint, pray that plaintiff take nothing by their amended complaint and that their action be dismissed, and that judgment be entered for the defendants for their costs and disbursements in this action.

EDWARD F. MEDLEY,

B. O. GRAHAM,

Attorneys for Defendants.

United States of America,

Territory of Alaska,—ss.

H. A. Slater, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

H. A. SLATER.

Subscribed and sworn to before me this 4th day of October, A. D. 1919.

[Notarial Seal] EDWARD F. MEDLEY,
Notary Public for the Territory of Alaska.

My Commission expires Oct. 11, 1921.

Service is hereby accepted on the foregoing answer this 4th day of October, 1919.

DONOHOE & DIMOND,
Attorneys for Plaintiffs.

[Indorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 11, 1919. Arthur Lang, Clerk. By C. H. Wilcox, Deputy.
[15]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,
vs.

H. A. SALTER and BANK OF ALASKA.

Reply.

Comes now the above-named plaintiffs and for reply to defendants' answer deny each and every allegation contained in said answer that in any manner controverts the allegations of plaintiffs' amended complaint, and deny each and every allegation contained in said answer by way of affirmative or new matter which in any way constitutes

a defense to any of the allegations contained in plaintiffs' amended complaint.

WHEREFORE plaintiffs pray a decree of this Honorable Court in accordance with the prayer contained in their amended complaint.

DONOHOE & DIMOND,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

A. E. Lathrop and Alice Johnson, each being first duly sworn, depose and say: That they have heard read the answer filed by defendants in the above-entitled cause; that they have read the foregoing reply and know the contents thereof and the same is true as they verily believe.

A. E. LATHROP.
ALICE JOHNSON.

Subscribed and sworn to before me this 4th day of October, 1919.

[Notarial Seal] R. H. L. NOAKS,
Notary Public for Alaska.

My Commission expires April 29, 1923.

The service of the foregoing reply is hereby accepted this — day of October, 1919.

EDWARD F. MEDLEY and
B. O. GRAHAM,
Attorneys for Defendant.

[Indorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 11, 1919. Arthur Lang, Clerk. By John B. Miller, Deputy.
[16]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Decree.

This cause came on regularly for trial at Cordova, Alaska, on the 11th day of December, 1919, and was tried by the Court without a jury. Each of the plaintiffs being present in person and represented by their attorneys, Donohoe and Dimond, and the defendant H. A. Slater being present in person and represented by his attorney, Edward F. Medley, Esq., and the defendant Bank of Alaska, a corporation, being represented by its attorney, B. O. Graham, Esq., and the Court having heard all the testimony and the argument of counsel, took the matter under advisement and granted the attorneys of the respective parties the right to file briefs, and thereafter briefs were duly filed and given due consideration by the Court, and the Court after duly considering all the evidence introduced and being fully advised in the premises, did on the 1st day of March, 1920, render its written opinion in favor of the plaintiffs and against the defendants, and on the 26th day of May, 1920, made and

filed its written findings of fact and conclusions of law.

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED as follows:

FIRST: That Burkhart Alley, being a certain alley in the town of Cordova, Territory of Alaska, extending from First Street to Second Street in Block No. 7, of said town, is declared to be a public thoroughfare or alley. Said alley being eight (8) feet wide and two hundred fourteen (214) feet long, the center line of which is along the dividing line between Lots Nos. 7 and 8, and Lots Nos. 25 and 26, in said Block No. 7. And it is declared that the general travelling public and the above-named plaintiffs have a perpetual easement over and upon said alleyway for public travel, subject to the following limitations: That portion of said alleyway extending from the easterly line of First Street in a westerly direction, a distance of one hundred (100) feet, is eight (8) feet wide by twelve (12) feet high from [17] present floor of said alley, and that portion of said alley extending from the westerly side of Second Street in a westerly direction one hundred (100) feet, is eight (8) feet wide, less a space on the southerly side of said alleyway along the building erected on Lot No. 25, about twenty (20) inches wide, which space is occupied by a high walk along the floor of the first story of said building. Said alleyway is over and upon four (4) feet of the land along the southerly side of Lots Nos. 7 and 26 and over and along four (4) feet of the

northerly side of Lots Nos. 8 and 25, in Block No. 7 of the said town of Cordova.

SECOND: That said defendants H. A. Slater and Bank of Alaska, a corporation, are hereby perpetually enjoined and restrained from in any manner obstructing or closing said alley or any portion thereof as hereinabove described, and they and each of them, their officers, agents, servants or employees, or any person or persons holding by, under or through them, or either of them, are perpetually enjoined and restrained from in any manner whatever obstructing or closing any part or portion of said alley as hereinbefore described, or from doing any act or thing whatsoever that will in any manner interfere with or prevent the use of said alleyway as a public thoroughfare or highway, or with the free use and enjoyment by these plaintiffs and the general travelling public of the easement created by and upon the lots heretofore mentioned and described as a public alley or thoroughfare.

THIRD: That the plaintiffs and each of them do have and recover of and from the defendants and each of them the costs and disbursements incurred by plaintiffs in the prosecution of this suit, taxed at the sum of \$117.05. Said costs and disbursements to be taxed by the Clerk of the District Court, Third Judicial Division, Territory of Alaska, and when so taxed, to be inserted in the blank space left in this decree and to become a part thereof, and thereafter let execution issue in favor of plaintiffs and against defendants and each of them for

the amount of said costs and disbursements so taxed.

Done in open court his 26th day of May, 1920.

CHARLES E. BUNNELL,
Judge.

Service of the foregoing proposed decree is accepted by receiving a copy thereof this 22d day of March, 1920.

B. O. GRAHAM,
EDWARD F. MEDLEY,
Attorneys for Defendants.

Filed in the District Court, Territory of Alaska, Third Division. May 26, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy.

Entered Court Journal No. 12, page No. 812.
[18]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,

Defendants.

Petition for Appeal.

To the Honorable CHARLES E. BUNNELL, District Judge:

The above-named H. A. Slater, one of the de-

defendants herein, feeling himself aggrieved by the decree entered in this cause on the 26th day of May, A. D. 1920, and the above-named Bank of Alaska, a corporation, one of the defendants herein, feeling itself aggrieved by said decree, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith, and they do pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such case made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

EDWARD F. MEDLEY,

B. O. GRAHAM,

Attorneys for said H. A. Slater, and Bank of Alaska. Address: Cordova, Alaska.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 3, 1920. Arthur Lang, Clerk. By Thos. S. Scott, Deputy. [19]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,
Defendants.

Assignment of Errors.

Come now the defendants in the above-entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 26th day of May, A. D. 1920:

1.

That the District Court for the Territory of Alaska, Third Division, erred in overruling defendants' objection to the following question propounded to Alice Johnson, one of the plaintiffs, called and sworn in her own behalf, and in permitting said witness to answer said question:

“Was the fact that Burkhart Alley was laid out and being used generally by the public one of the inducements that induced you to buy that property for \$5,000.00?” (Transcript of Testimony, p. 35.)

2.

Said Court erred in sustaining plaintiff's objec-

tion to the following question propounded by defendants' counsel to witness Bartley Howard and in refusing to permit said witness to answer said question:

"I wish you would explain what was done and said by the members of the council—what was said by the members of the council at that time in regard to raising the assessor's assessment on lots 7 and 8, block 7, from \$6,000.00 to \$7,500.00?" (Transcript of Testimony, p. 201.)

3.

Said Court erred in sustaining plaintiff's objection to defendants' offer in evidence of certified extract from the minutes of the common council of the town of Cordova, relating to motion made by the plaintiff Lathrop a member of the council:

"That the City Clerk be instructed to intervene in behalf of the city in this case." and in rejecting said offer. (Transcript of Testimony, p. 208.) [20]

4.

Said Court erred in permitting the witness A. E. Lathrop to answer the following question and in denying defendants' motion to strike out the witness' answer to said question:

"Q. And what condition does that leave the surface of the alley in the winter-time in regard to snow?

"A. It is impossible to get through." (Transcript of Evidence, p. 230.)

5.

Said Court erred in finding as a fact that part of Finding No. 1 which reads as follows:

“That each of said plaintiffs are particularly damaged in a manner special and different from the damage to the general public of the Town of Cordova, by the acts committed by the above-named defendants and in the acts threatened to be committed by the above-named defendants as hereinafter set forth.”

6.

Said Court erred in finding as a fact that part of Finding No. 1 which reads as follows:

“That plaintiffs bring this action . . . for and on behalf of the general public of the said town of Cordova.”

7.

Said Court erred in finding as a fact that part of Finding No. 3 which reads as follows:

“That if said defendants are permitted to obstruct said Burkhart Alley and to close the same to the travel of the general public and to this plaintiff, this plaintiff will be specially damaged thereby, by causing a reduction in the rental values of said buildings and this plaintiff's income therefrom, and will greatly depreciate the value of this plaintiff's said building and he will suffer irrevocable injury and loss.”

8.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“The only entrance to her said apartments in the basement story is off Burkhart Alley and the second story by walk from Second Street.”

9.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“At which time and for a great many years prior thereto, Burkhart Alley was and had been an open public way.” [21]

10.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“And was and had been continually used by the public as such.”

11.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“That if said defendants are permitted to obstruct the said Burkhart Alley and to close the same to travel by the general public and to the use of this plaintiff, this plaintiff will suffer irreparable injury and loss in her property rights in said lot and building.”

12.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“And the rental value of her apartments will be greatly depreciated and the value of her said lot and building will be greatly depreciated.”

13.

Said Court erred in finding as a fact that part of Finding No. 6 which reads as follows:

“And they agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town.”

14.

Said Court erred in finding as a fact that part of Finding No. 6 which reads as follows:

“That the owners of Lot No. 7 and Lot No. 26 in Block 7 gave 4 feet off the southerly side of their said lots for said alley.”

15.

Said Court erred in finding as a fact that part of Finding No. 6 which reads as follows:

“The owners of Lots Nos. 8 and 25, in Block No. 7, gave 4 feet of the northerly side of their said lots for said alley.”

16.

Said Court erred in finding as a fact that part of Finding No. 6 which reads as follows:

“That Burkhart Alley as herein described was originally opened up and ever since has been used and maintained.”

17.

Said Court erred in finding as a fact that part of Finding No. 7 which reads as follows:

“That said Burkhart Alley was first opened up to public travel about the month of October, 1908.” [22]

18.

Said Court erred in finding as a fact that part of Finding No. 7 which reads as follows:

“And it ever since has been used by the general public as a public highway.”

19.

Said Court erred in finding as a fact that part of Finding No. 7 which reads as follows:

“And ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs.”

20.

Said Court erred in finding as a fact that part of Finding No. 7 which reads as follows:

“And ever since has . . . without . . . permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs.”

21.

Said Court erred in finding as a fact that part of Finding No. 8 which reads as follows:

“The common council of the town of Cordova has exercised rights of ownership, authority, and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever.”

22.

Said Court erred in finding as a fact that part of Finding No. 8 which reads as follows:

“That the said common council has provided for the lighting of said Burkhart Alley a good portion of said time.”

23.

Said Court erred in finding as a fact that part of Finding No. 8 which reads as follows:

“And has supervised and required the sidewalk in said alley to be kept in good repair.”

24.

Said Court erred in finding as a fact that part of Finding No. 8 which reads as follows:

“And by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time.” [23]

25.

Said Court erred in finding as a fact that part of Finding No. 9 which reads as follows:

“That at no time since Burkhart Alley was opened to the public use as hereinbefore described have the owners of any of the four lots abutting on said ally claimed or contended that said alley was not a public highway until defendant Slater herein on the 8th day of August, 1919, and the defendant Bank of Alaska, on the 10th day of September, 1919, attempted to obstruct and close said Burkhart Alley and prevent the public and these plaintiffs from the free use and enjoyment thereof.”

26.

Said Court erred in finding as a fact that part of Finding No. 10 which reads as follows:

“That at the time each of said defendants purchased their respective lots, said Burkhart Alley was a public highway.”

27.

Said Court erred in finding as a fact that part of Finding No. 10 which reads as follows:

“And has been continuously used by the general public since the year 1908 as a public highway.”

28.

Said Court erred in finding as a fact that part of Finding No. 10 which reads as follows:

“And each of said defendants has full knowledge of said fact.”

29.

Said Court erred in finding as a fact that part of Finding No. 11 which reads as follows:

“That on the 8th day of August, 1919, defendant H. A. Slater unlawfully and without right or authority obstructed the free use and enjoyment of Burkhart Alley.”

30.

Said Court erred in finding as a fact that part of Finding No. 11 which reads as follows:

“That each of said defendants unlawfully claimed the right to close and obstruct Burkhart Alley.”

31.

Said Court erred in finding as a fact that part of Finding No. 12 which reads as follows:

“That if said defendants or either of them is permitted to obstruct and close said Burkhart Alley and prevent these plaintiffs and the general public from the free use and enjoyment of said Burkhart Alley, these plaintiffs will suffer great and irreparable injury and loss in their property rights.” [24]

32.

Said Court erred in finding as a fact that part of Finding No. 12 which reads as follows:

“And the travelling public of the town of Cordova will suffer great inconvenience, loss and damage.”

33.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That more than ten (10) years have elapsed since said Burkhart Alley was laid out and first used as a public street, prior to the time either of these defendants first asserted or claimed the right to close said alley or any portion thereof.”

34.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“And during all of said time, said Burkhart Alley was continuously and without interruption used by and in the exclusive possession of the inhabitants, residents and general public of the said town of Cordova, as a public street or alley.”

35.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“With the knowledge and acquiescence at all times of the owners of all of said lots crossed by said alley and without license or permission of, hindrance or objection from, any person or persons whomsoever.”

36.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“And that such use and possession by the public of said alley as a public alley was during all of said time, adverse, hostile, continuous, exclusive and under color and claim of right.”

37.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That the common council of the town of Cordova, shortly after said Burkhart Alley was first opened to public travel and use as hereinbefore stated, accepted said alley as a public thoroughfare by lighting the same.”

38.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That the common council of the town of Cordova . . . accepted said alley as a public thoroughfare by . . . keeping the same clear from all obstructions.” [25]

39.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That the common council of the town of Cordova . . . accepted said alley as a public thoroughfare by . . . requiring the sidewalk in said alley to be kept in good repair.”

40.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“And generally exercised supervision, control and ownership over said alley and continued to do so to the present time.”

41.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That the travel and use of said alley by the general public passing through said alley and over and upon the same far exceeded the travel on either ‘B’ or ‘C’ Street between First and Second Street during all the time hereinbefore mentioned.”

42.

Said Court erred in concluding and adopting that part of Conclusion of Law No. 1 which reads as follows:

“That said Burkhart Alley in the month of October, 1908, became and ever since has been and now is a public thoroughfare or alley by reason of an implied dedication arising from the acts of the owners of Lots Nos. 7 and 8 and Lots Nos. 25 and 26, in Block No. 7, in the town of Cordova.”

43.

Said Court erred in concluding and adopting Conclusion of Law No. 2 which reads as follows:

“That said Burkhart Alley as described in the foregoing findings of fact, at the time when

said defendants attempted to obstruct a portion of said alley, to wit, on the 8th day of August, 1919, and on the 10th day of September, 1919, was, and ever since has been, and now is, a public thoroughfare and alley by prescription, the same having been used exclusively and continuously by the general public of the town of Cordova for a period of more than ten years prior to the said 8th day of August, 1919, under color of title and claim of right, and adverse and hostile to the owners of the respective lots over which said alley passes and with the knowledge and acquiescence of said owners but without their license or permission, and without any objections from them or any of them."

44.

Said Court erred in concluding and adopting that part of Conclusion of Law No. 2 which reads as follows:

"That said Burkhart Alley as described in the foregoing findings of fact was at the time when said defendants attempted to obstruct and close a portion of said alley, to wit, on the 8th day of August, 1919, and on the 10th day of September, 1919, was, and ever since has been and now is a public thoroughfare and alley by prescription." [26]

45.

Said Court erred in concluding and adopting Conclusion of Law No. 3 which reads as follows:

"That plaintiffs are entitled to have said Burkhart Alley, as described in the foregoing

findings of fact, maintained and kept free from obstructions and continuously open for the free and uninterrupted travel and use by these plaintiffs and the general public of the town of Cordova, as a public thoroughfare or alley."

46.

The Court erred in concluding and adopting that part of Conclusion of Law No. 4 which reads as follows:

"That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or closing said Burkhart Alley as described in the foregoing findings of fact where the same passes upon and over Lots Nos. 7 and 8, in Block No. 7, in said town of Cordova."

47.

Said Court erred in concluding and adopting Conclusion of Law No. 4 which reads as follows:

"That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or closing said Burkhart Alley as described in the foregoing findings of fact where the same passes upon and over Lots Nos. 7 and 8, in Block No. 7, in said town of Cordova, to wit: An alley eight (8) feet wide, the center of which is the dividing line between Lots Nos. 7 and 8, in Block No. 7, and twelve (12) feet high for the entire length of Lots Nos. 7 and 8, and from in any manner whatever obstructing or closing said alley or

any part or portion thereof or in any manner interfering with the free use and enjoyment thereof as a public highway as the same was when first laid out and opened to public use and travel and ever since has been used and traveled by the public.”

48.

Said Court erred in concluding and adopting Conclusion of Law No. 5, or the order contained in paragraph No. 5, of said Conclusions of Law, if same is intended as an order, which Conclusion of Law reads as follows:

“That plaintiffs have decree against defendants and each of them in accordance with their prayer of their amended complaint and in accordance with the foregoing conclusions of law and have judgment against said defendants and each of them for the costs and disbursements incurred in this action by plaintiffs.” [27]

49.

Said Court erred in entering its decree and judgment in favor of the plaintiffs and against the defendants on the 26th day of May, 1920, for the reason that said decree and judgment is contrary to law and is not supported by the findings of fact or conclusions of law, pleadings or evidence in this cause.

WHEREFORE, by reason of the errors assigned, the appellants herein, said H. A. Slater and Bank

of Alaska, a corporation, pray that said decree and judgment be reversed.

EDWARD F. MEDLEY,
B. O. GRAHAM,

Attorneys for Defendants H. A. Slater and Bank
of Alaska, a Corporation.

Address: Cordova, Alaska.

Filed in the District Court, Territory of Alaska,
Third Division. Aug. 3, 1920. Arthur Lang, Clerk.
By Thos. S. Scott, Deputy. [28]

In the District Court for the Territory of Alaska,
Third Judicial Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Order Approving Bond.

It appearing to me that the appellants have filed
a good and sufficient cost bond herein, the sufficiency
thereof is hereby approved.

CHARLES E. BUNNELL,
District Judge.

Dated Fairbanks, Alaska, Nov. 12, 1920.

Filed in the District Court, Territory of Alaska,

Third Division. Nov. 13, 1920. Arthur Lang,
Clerk.

Entered Court Journal No. 13, page No. 59. [29]

In the District Court for the Territory of Alaska,
Third Judicial Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Order Allowing Appeal.

Petition of defendants H. A. Slater and Bank of Alaska, a Corporation, for allowance of an appeal to the United States Court of Appeals for the Ninth Circuit, from the final decree entered in the above-entitled court and cause on May 26th, 1920, together with assignment of errors relied upon by defendants upon their prosecution of said appeal and prayed for reversal of said decree, having been filed on August 16th, 1920:

IT IS ORDERED THAT SAID APPEAL to the United States Circuit Court of Appeals for the Ninth Circuit from said final decree be and the same hereby is allowed said defendants, and that a certified transcript of the record, testimony, exhibits, stipulations and all other proceedings in said

cause be herewith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of ONE THOUSAND DOLLARS.

Dated at Fairbanks, Alaska, November 12th, 1920.

CHARLES E. BUNNELL,

District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1920. Arthur Lang, Clerk.

Entered Court Journal No. 13, page No. 59. [30]

Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1920. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.

In the District Court for the Territory of Alaska,
Third Judicial Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,

Defendants.

Citation.

United States of America,—ss.

The President of the United States to A. E. Lathrop
and Alice Johnson, and Their Attorneys,
GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, within thirty days from the date of this writing pursuant to an order allowing an appeal filed and of record in the office of the Clerk of the District Court for the Territory of Alaska, Third Division, wherein H. A. Slater and Bank of Alaska, a corporation, are appellants, and you, the said A. E. Lathrop and Alice Johnson, are appellees, to show cause if any there be, why the final decree rendered against said appellants and signed, filed and entered on May 26, 1920, in that certain suit being in equity Number C—173, wherein the said A. E. Lathrop and Alice Johnson are plaintiffs and said H. A. Slater and Bank of Alaska, a corporation, are defendants as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice [31] of the Supreme Court of the United States, this 12th day of November, 1920.

CHARLES E. BUNNELL,
Judge of the District Court for the Territory of
Alaska. [32]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Acknowledgment of Service of Citation.

Service of the citation on appeal issued in the above-entitled cause by Hon. Charles E. Bunnell, Judge of the District Court for the Territory of Alaska, on November 12th, 1920, by receipt of a true copy thereof, is hereby acknowledged at Cordova, Alaska, this 19th day of November, 1920.

DONOHOE & DIAMOND,

By T. J. DONOHOE,

Attorneys for A. E. Lathrop and Alice Johnson,
Plaintiffs. [33]

Filed in the District Court, Territory of Alaska,
Third Division. Nov. 10, 1920. Arthur Lang,
Clerk. By ———, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, H. A. Slater, and Bank of Alaska, as
principals, and Chas. J. Goodall and Bartley How-
ard, of Cordova, Alaska, as sureties, are held and
firmly bound unto A. E. Lathrop and Alice John-
son, the plaintiffs above named, in the sum of One
Thousand Dollars (\$1,000.00), to be paid said A. E.
Lathrop and Alice Johnson, and their respective
executors, administrators, successors and assigns, to
which payment, well and truly to be made, we bind
ourselves and each of our executors, administrators
and personal representatives, jointly and severally,
firmly by these presents.

Sealed with our seals and dated this 8th day of
November, A. D. 1920.

The condition of the above obligation is such that,—

WHEREAS, the above-named defendants, H. A. Slater and Bank of Alaska have petitioned for an appeal to the United [34] States Circuit Court of Appeals for the Ninth Circuit, to reverse the final decree made and entered in the above-entitled cause of the 26th day of May, A. D. 1920, by the District Court for the Territory of Alaska, Third Division.

NOW, THEREFORE, if the above-named defendants, H. A. Slater and Bank of Alaska, shall prosecute said appeal to effect and shall answer all costs that may be awarded against them, if they shall fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and effect.

H. A. SLATER,
By B. O. GRAHAM,
His Attorney,
BANK OF ALASKA,
By B. O. GRAHAM,
Its Attorney,
Principals.
CHAS. J. GOODALL,
BARTLEY HOWARD,
Sureties. [35]

United States of America,
Territory of Alaska,—ss.

Chas. J. Goodall, being first duly sworn on oath, deposes and says:

I am one of the sureties named in and who ex-

ecuted the foregoing bond. I am a resident within the Territory of Alaska, and am worth the sum of One Thousand Dollars (\$1,000.00), exclusive of property exempt from execution and over and above all just debts and liabilities. I am not a counselor or attorney at law, marshal, commissioner, clerk of any court or other officer of any court.

CHAS. J. GOODALL.

Subscribed and sworn to before me this 8th day of November, A. D. 1920.

[Seal]

B. O. GRAHAM,

Notary Public for the Territory of Alaska.

My commission expires April 24, 1922.

United States of America,

Territory of Alaska,—ss.

Bartley Howard, being first duly sworn, on oath, deposes and says:

I am one of the sureties named in and who executed the foregoing bond. I am a resident within the Territory of Alaska, and am worth the sum of One Thousand Dollars (\$1,000.00), exclusive of property exempt from execution and over and above all just debts and liabilities. I am not a counselor or attorney at law, marshal, commissioner, clerk of any court or other officer of any court.

BARTLEY HOWARD.

Subscribed and sworn to before me this 8th day of November, A. D. 1920.

[Seal]

B. O. GRAHAM,

Notary Public for the Territory of Alaska.

My commission expires April 24, 1922. [36]

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Bill of Exceptions.

Come now the above-named defendants, H. A. Slater and Bank of Alaska, a corporation, and, being about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered herein by the District Court for the Territory of Alaska, Third Division, on the 26th day of May, 1920, files herein and petitions and prays said District Court to settle, certify and make a part of the record herein upon such appeal, the hereinafter mentioned proceedings, objections, rulings and exceptions, all of which appear of record herein and are hereinafter fully set forth, said proceedings, objections, rulings and exceptions appearing in the following described records, files, papers and proceedings, filed, had and done herein, hereunto attached and made a part hereof, to wit:

Transcript of the Record of Evidence and Proceedings had at trial, certified by the Official Court Stenographer. [37]

Decision and Opinion of the Trial Court.

Findings of Fact and Conclusions of Law.

Defendants' Exceptions to Findings of Fact and
Conclusions of Law.

Order Allowing Exceptions.

Order Enlarging Time for Filing and Serving Bill
of Exceptions to August 20, 1920.

Order Settling and Certifying Bill of Exceptions.

EDWARD F. MEDLEY.

B. O. GRAHAM,

Attorneys for Defendants.

Service of the foregoing proposed bill of exceptions and of all papers, records and proceedings therein mentioned, by receipt of copy, thereof, acknowledged at Valdez, Alaska, this 18th day of August, 1920.

DONOHOE & DIMOND,

By ANTHONY J. DIMOND,

Attorneys for Plaintiffs.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1920. Arthur Lang, Clerk. By _____, Deputy.

[38]

In the District Court for the Territory of Alaska,
Third Division.

No. C/173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,
Defendants.

Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard at Cordova, Alaska, in said Division and Territory, on Thursday, the 11th day of December, 1919, before the Honorable CHARLES E. BUNNELL, Judge of said court:

The plaintiffs being represented by their attorneys and counsel, Messrs. DONOHUE & DIMOND.

The defendants being represented by their attorneys and counsel, B. O. GRAHAM, Esq., and E. F. MEDLEY, Esq.:

WHEREUPON the following proceedings were had and done, to wit: [39]

In the District Court for the Territory of Alaska,
Third Division.

No. C/173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

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Mr. MEDLEY.—It was stipulated between the attorneys for the plaintiffs and defendants to take the deposition of Robert Ashland, who lives in Vancouver. Interrogatories, direct and cross, were prepared and under the stipulation sent to a firm of lawyers in Vancouver, requesting that the deposition be taken. They were returned and after a while were published by stipulation of the attorneys. Later we discovered that through an error there were six of the cross-interrogatories omitted from the deposition. Immediately that was called to my attention I made a new stipulation with Mr. Donohoe and we sent them back to this same firm of lawyers, requesting they complete the deposition, and calling their attention to the error. On the last boat, I think it was, I got a letter from these attorneys saying they had completed the deposition and sending me a copy of the answers to the last six interrogatories. The original copy of the deposition has not yet arrived here and yesterday I wired the Clerk of the court at Valdez asking if it had been received there but I have not yet received an answer. Now, the defendants are willing to go ahead with this case but they feel that the testimony of Ashland is important and would like to have it agreed that the Court may consider the deposition with the files in the case when received. There has been no wilful delay and it may be that Mr. Donohoe will agree that the copy I have may serve as answers to the six interrogatories for the original. I will take that up with him during the noon hour.

Mr. DONOHOE.—I think very likely we can

agree but I have not seen the copies. We can decide at noon whether we can agree or not. I have no objection to the Court considering these depositions when they come. [41—2]

Mr. DONOHOE.—You have read the pleadings, your Honor?

The COURT.—Yes.

Mr. DONOHOE.—Then we will not make any opening statement.

Mr. MEDLEY.—We have no statement to make.

Mr. DONOHOE.—I have a diagram here, a plat, copy of which is attached to the complaint, and it has been stipulated orally between counsel so as to avoid the necessity of bringing a surveyor into court that this is a correct diagram or plat of the various points referred to in the pleadings, with one exception, that the west half of Burkhart Alley, extending from First Avenue to the alley running north and south through the block, the regular alley, that this plat does not show the overhead part—that alley is covered. I will now call Mr. Lathrop. [42—3]

Testimony of Austin E. Lathrop, in His Own Behalf.

AUSTIN E. LATHROP, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. State your name and residence.

A. Austin E. Lathrop; Cordova, Alaska.

Q. When did you first take up your residence in Cordova?

(Testimony of Austin E. Lathrop.)

A. Do you call Eyak Cordova?

Q. No, I mean the town of Cordova.

A. I came here in the summer, along about September, the year the town was opened,—1908, I think.

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. Have you lived in Cordova since 1908 with the exception of the short period you lived in Anchorage? A. Yes, sir.

Q. What years was it you lived in Anchorage?

A. I went over there in 1916, when the town started—1915 and '16.

Q. During the time you lived in Anchorage were you off and on in Cordova?

A. I was in business here most all of the time—I was in business all the time. I have reference to the Transfer Company.

Q. That was your business in Cordova the first years you were living here?

A. Yes, transfer business.

Q. You are acquainted with your codefendant, Alice Johnson? A. Yes, sir.

Q. You are acquainted with Mr. H. A. Slater?

A. Yes, sir.

Q. And the Bank of Alaska? A. Yes, sir.
[43—4]

Q. Are you the owner of Lots 24, 25 and 26 in Block 2 of the town of Cordova? A. Yes, sir.

Q. Have you within recent years constructed a building on these lots? A. I have.

(Testimony of Austin E. Lathrop.)

Q. What is the size of that building?

A. 75 by 100, three stories, on First Avenue.

Q. Is it a substantial building? A. It is.

Q. And approximately what was the cost of that structure?

A. The building isn't complete but I have over \$100,000 already invested.

Q. What are the businesses occupying the first floor of the building on First Avenue?

A. Well, first would be the main entrance to the Empress Theatre; the next is the Style Shop owned by Miss Helen Bell, and the next is occupied by two stores, the Admiral Line Steamship office and the Bludhorn jewelry store. The third store is not occupied yet.

Q. Miss Bell, the store she occupies, is for women's goods? A. Yes, sir.

Q. And the next store is partly occupied by a jewelry store? A. Yes, sir.

Q. What have you on the first floor, upstairs?

A. We have a dentist's office, United States cable office and two physicians, and apartments.

Q. Are the apartments occupied?

A. Yes, sir.

Q. What have you on the third floor?

A. Apartments. [44—5]

Q. Are the apartments occupied?

A. Yes, sir.

Q. Could you approximately state the number of tenants you have in the building at this time?

(Testimony of Austin E. Lathrop.)

A. You mean the number of people occupying the building?

Q. Yes, the number of people occupying the building, approximately?

A. I would say between forty and fifty.

Q. Are you acquainted with the property occupied by Alice Johnson, Lot 25 in Block 7 of the town of Cordova? A. Yes, sir.

Q. What structures are on this lot?

A. I think there is a building on it between 20 and 21 feet front and 100 feet deep.

Q. What structures are on it, I asked you, what buildings?

A. I say a building about 21 feet wide by 100 feet deep.

Q. How many stories?

A. Two stories and a basement.

Q. What is the main portion of this building used for? A. It is an apartment house.

Q. Is there a cross-walk maintained by the city extending from the westerly terminus of Burkhart Alley to the westerly side of First Street?

A. Yes, sir.

Q. In relation to your building where does that sidewalk run on the westerly side of First Street, that cross-walk?

A. I would say right in front of Helen Bell's Style Shop.

Q. Are you acquainted with what is known as Burkhart Alley? A. Yes, sir.

Q. What would you say would be the damages or

(Testimony of Austin E. Lathrop.)

the reduced price of your building you have described and the reduced price of [45—6] the rental values of the various stores and apartments in your building if the westerly half of Burkhart Alley should be closed, and by the westerly half I mean that portion of Burkhart Alley extending from First Street in a westerly direction 100 feet to the regular alley running north and south in Block 7, and also if the cross-walk extending from the westerly terminus of Burkhart Alley acrossed First Avenue was taken up?

Mr. GRAHAM.—We object to the question as irrelevant. The defendants have nothing whatever to do with the cross-walk put in by the city across First Street—the defendants have no control over it and would have nothing to do with it, nothing to do with putting it in, and it does not in any way affect their property—they cannot be bound by something they cannot object to.

Mr. DONOHOE.—If the city only maintains cross-walks at the intersection of streets and it can be proved by testimony in this case that at one time there were three cross-walks acrossed First Street along Block 7, one in front of the Boyle Drugstore, one in front of Clayson's and one extending from the westerly terminus of Burkhart Alley, and the City Council ordered the other two walks taken up, and this witness now on the stand can testify that the reason the cross-walks were taken up was because they were not at the intersection of any street, it seems to me it is competent evidence.

(Testimony of Austin E. Lathrop.)

The COURT.—The objection will be overruled and exception allowed. If it does not become pertinent the Court will entertain a motion to strike.

A. In dollars and cents it would be almost impossible for me to arrive at the damages. The cross-walk is just as essential to that building as the walk almost in front of the building. The value of that cross-walk you might refer to it in a smaller way by [46—7] the fact that Clayson placed a great value on his walk, only 50 or 55 feet from this regular walk—

Mr. GRAHAM.—We object to that form of answer and not responsive.

Q. Confine yourself to your judgment whether it would materially damage your values there or otherwise.

A. It certainly would materially damage the business in that building. It has always been considered that there was one side to First Avenue, one side of the street.

Q. You mean the greater portion of travel followed one side? A. Yes, sir.

Q. Which side of First Avenue?

A. That would be the east side, the opposite side from our building. That is the side that has had in the past the travel and it has been uphill work to build or open or maintain a business—

Mr. MEDLEY.—We object to that as not responsive.

The COURT.—He may proceed.

Q. How do you arrive at the opinion that it would

(Testimony of Austin E. Lathrop.)

materially damage the values of your property if this alley was closed and that cross-walk removed?

A. Well, the travel that takes place over that walk—you will notice after the picture show is out, probably, well I would say 75% of the attendants cross that walk. If we had no walk there I am satisfied that the picture show and other businesses as well as the parties would suffer.

Q. Do you know of any other cross-walk being acrossed First Street some time before this?

A. Yes, sir.

Q. Where were those cross-walks?

A. There was one built by Clayson—

Q. How far is that in relation to the cross-walk in front of your building? [47—8]

A. Seventy-five feet.

Q. To the north? A. To the north.

Q. Do you know of any other cross-walk?

A. The Cordova Drugstore.

Q. Where is that in relation to yours?

A. That is south of the main cross-walk.

Q. How far approximately?

A. Nearly 100 feet.

Q. Do you know of these two cross-walks being removed? A. Yes, sir.

Q. By whose orders? A. By the City.

Q. For what reason?

Mr. GRAHAM.—We object to that as incompetent.

Objection overruled; defendants allowed an exception to the ruling.

(Testimony of Austin E. Lathrop.)

Q. For what reason were those walks removed—why were they removed?

A. I think the basis of the complaint was to vehicles and transfer teams traveling there.

Q. Have these cross-walks been removed at the intersection of any street coming on to First Avenue?

A. No.

Mr. MEDLEY.—We object to that as incompetent, irrelevant and immaterial, and move to strike the answer.

Objection overruled and motion denied; defendants allowed an exception.

Q. Are you acquainted with the property owned by your coplaintiff, Alice Johnson, situated on Lot 25 in Block 7, Cordova? Do you know the nature of the buildings on the property?

A. Yes, sir. [48—9]

Q. What in your judgment would be the depreciation caused to this property and the value of the property and in the rental incomes derived from the property should Burkhart Alley be closed on the westerly end, where it passes through and over a portion of Lot 7 in Block 7?

Mr. MEDLEY.—We object to that as incompetent, irrelevant and immaterial, and requiring an expert opinion, for which this witness is not qualified.

Objection overruled and defendants allowed an exception. A. At least 50%.

Q. What would be your reasons or basis for that opinion?

(Testimony of Austin E. Lathrop.)

A. As the property stands now it is practically First Avenue property—it is accessible from First Avenue.

Q. Is First Avenue the main business street of the town of Cordova? A. Yes, sir.

Q. What do you mean by that, is First Avenue property now?

A. It is nearer to First Avenue, being able to use the alley.

Q. By being able to use the Burkhart Alley?

A. Yes, sir.

Q. Were you a resident of the town of Cordova in the summer and fall of the year 1908?

A. Yes, sir.

Q. And I believe you stated you were in the transfer business at that time? A. Yes, sir.

Q. Do you know of Robert Ashland constructing a building on Lot 7 in Block 7 of the town of Cordova in the summer and fall of the year 1908?

A. Yes, sir.

Q. Do you know how he constructed the south wall of this building in reference to the south line of Lot 7 in Block 7 of Cordova? [49—10]

A. He set his wall back.

Q. How far?

A. Well, I think it was four feet.

Q. And did he leave a strip along the full length of Lot 7, Block 7, or on the southerly side line, four feet wide? A. Yes.

Q. On the ground floor?

A. On the ground floor.

(Testimony of Austin E. Lathrop.)

Q. That is, on the street level of First Avenue?

A. Yes, sir.

Q. Were you in Cordova when Mr. Burkhart constructed a building on Lot 8 in Block 7, of the town of Cordova, in the summer or fall of 1908?

A. Yes, sir.

Q. How did he construct the north wall of this building with reference to the north side line of Lot 8, Block 7, of the town of Cordova?

A. He set his building back four feet or about that.

Q. That is on the street level of First Avenue, the ground floor; is that right? A. Yes, sir.

The COURT.—Does that extend back through the entire lot—does the four feet strip extend back through the entire lot?

A. The 100 feet; yes, sir.

Q. It extends back from First Avenue to the regular alley running north and south through Block 7?

A. Yes, sir.

Q. A four-foot strip left on each of the two lots, making an eight-foot strip, the centre of which was along the dividing line between Lots 7 and 8? [50—11] A. Yes, sir.

Q. What was done with that eight-foot strip, for what purpose was it used?

A. As a public highway.

Mr. GRAHAM.—We object to that and move it be stricken as calling for a calling of the witness.

Motion granted—answer stricken.

Q. What use was put of that eight-foot strip between these two buildings?

(Testimony of Austin E. Lathrop.)

A. At that time Lindig had a cafe in the rear of the Ashland Building and I don't recall what business was in the rear of the building occupied by the Bank of Alaska now. There was some business in there and there was some rooms for rent upstairs there, over the Ashland Building and Mr. Ashland had a saloon at that time.

Q. You haven't answered my question. I asked you what was done or what use was made of the eight-foot strip left between the walls of the two buildings?

A. It was used as a public highway for those people to reach these public places of business, these particular places.

Mr. GRAHAM.—We make the same objection.

The COURT.—That portion of the answer may be stricken. What was it used for? Your answer that it was a public highway is in the nature of a conclusion—what was this strip used for, without using the term public highway?

A. We handled our freight through there; we unloaded liquor, etc., and people passed through back and forth.

Q. Now, then, Lot 26 in Block 7, which was the property in which M. Finklestein in the fall of 1908 opened up a clothing store— A. Yes.

Q. Are you familiar with the building which was erected on this [51—12] lot in the summer of 1908? A. Yes, sir.

Q. How was the south wall of this building erected with reference to the south wall of Lot 26?

(Testimony of Austin E. Lathrop.)

A. It stood back four feet.

Q. Then the south wall of the building was set back four feet from the side line of the lot?

A. Yes, sir.

Q. How was the building erected on Lot 25 which is now the Alice Johnson property, how was it erected in reference to the north line of Lot 25?

A. It stood back four feet.

Q. Did this make a passageway leading from First Avenue to Second Avenue, 8 feet wide?

A. Yes, sir.

Q. Now, what was that alleyway from First Street to Second Street used for and by whom was it used?

A. It was used by the public and by the owners of the property.

Q. Could you say whether the public have constantly used this alley from that time on?

A. They have.

Q. What would you say was the amount of travel through and over this alley from the fall of 1908 until the fall of 1919 in reference to the amount of travel that passed up and down East B Street and C Street, between First and Second Avenues?

A. During the time the postoffice was on Second Avenue a conservative estimate would be 80%.

Q. Eighty per cent of the travel?

A. Yes.

Q. Between First and Second Avenue, passed through Burkhart Alley? [52—13]

A. Yes, sir.

(Testimony of Austin E. Lathrop.)

Q. Where was the postoffice situated at that time?

A. In what is known as the Ostrander Building.

Q. What years was the postoffice situated in the Ostrander Building?

A. I would have to guess at that. The postoffice originally was in what is known as the Alaskan now the McCormick Hotel, and I believe was moved—I am not sure, I think the Ostrander Building was built in 1909 and the postoffice moved up there shortly afterwards.

Q. How long did it remain after 1909 in the Ostrander Building?

A. It remained there until they moved down to where they are at the present time. I wasn't here when they moved—it is about a year now, not quite a year.

Q. What would you say as to the amount of travel that passes through and over Burkhart Alley between First and Second Avenues since the postoffice was moved from Second Avenue to First Avenue?

A. Well, I would say forty to fifty per cent.

Q. Of the travel between First and Second Avenues? A. Yes.

Mr. DONOHOE.—If the Court please, I want to withdraw this witness for a moment and put Mr. Hesse on the stand.

The COURT.—Very well.

Witness excused. [53—14]

Testimony of W. A. Hesse, for Plaintiff.

W. A. HESSE, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name?

A. W. A. Hesse.

Q. Where do you reside? A. Cordova.

Q. What is your business or occupation?

A. Mining engineer.

Q. Are you also a surveyor? A. Yes, sir.

Mr. MEDLEY.—We admit Mr. Hesse's qualifications to make a map and his ability.

Q. Did you some time in the month of September make a map of a certain portion of the town of Cordova in reference to Burkhart Alley, at my request?

A. No, sir; it was in the month of August.

Q. Did you make that map from a survey actually made of the ground? A. Yes, sir.

Mr. DONOHOE.—I ask that this map be marked Plaintiff's Exhibit "A" for Identification.

(It is so marked.)

Q. I hand you a plat, marked Plaintiffs' Exhibit "A" for Identification, and ask you if that is the plat you prepared of Burkhart Alley. A. Yes, sir.

Q. Does this plat correctly show the building of A. E. Lathrop on the westerly side of First Avenue in the town of Cordova? A. Yes, sir.

Q. Does it correctly show the sidewalk on the west-

(Testimony of W. A. Hesse.)

erly side of the town of Cordova in front of the Lathrop Building? [54—15]

A. Yes, I think it does.

Q. And the fire hydrant set on the westerly side of First Avenue close to the cross-walk acrossed First Avenue? A. Yes, sir.

Q. And the cross-walk, being from the westerly terminal of Burkhart Alley, acrossed First Street—is that correctly described and shown? A. Yes, sir.

Q. And does it correctly show Lots 7 and 8, 25 and 26 in Block 7 in the town of Cordova?

A. Yes, sir; I believe it does.

Q. And does it correctly show Burkhart Alley leading from First Avenue to Second Avenue through Block 7 in the town of Cordova? A. Yes.

Q. And does it correctly show the street line on the westerly side of Second Avenue? A. Yes, sir.

Q. And the fire hydrant on the easterly side of Second Avenue? A. Yes, sir.

Mr. DONOHUE.—We offer the plat in evidence and ask that it be marked Plaintiffs' Exhibit "A."

Mr. MEDLEY.—We have no objection to the plat but I want a little explanation. I will ask the witness a few questions.

The COURT.—Very well.

(By Mr. MEDLEY.)

Q. This plat doesn't show the overhead structure on Lots 7 and 8? A. No, sir.

Q. I would like to call your attention to the cross-walk over First Street—isn't this sidewalk continued right through here?

(Testimony of W. A. Hesse.)

A. That sidewalk is continued through; yes, sir.
[55—16]

Q. That sidewalk is continued through—that map is not accurate—it doesn't show the actual construction of this sidewalk right through?

A. That sidewalk, of course, the curb line, is continuous. I didn't think at the time I made it that—it would probably be better to show the curb line as being continuous.

Q. Is it the same on both sides of First Avenue, the cross-walk?

A. I think it is. Without you indicate the curb outline it would probably be a better delineation to show the cross-walks as continuous.

Mr. MEDLEY.—*We* these exceptions the defendants have no objection.

The COURT.—I understand the curb line is continuous on the main street? A. Yes, sir.

The plat is admitted in evidence as Plaintiffs' Exhibit "A"; is attached hereto and made a part hereof. (By Mr. DONOHOE.)

Q. Mr. Medley asked you as to whether Plaintiffs' Exhibit "A" showed the overhead structure over Burkhart Alley between Lots 7 and 8 in Block 7 and you said it did not show the overhead part, the adjoining buildings overhead. How high is it from the sidewalk of Burkhart Alley to the bottom, the lowest point, of this overhead structure?

A. Well, really, I don't know,—I had no instructions to take notice of that and if I undertook to tell you it would be just making a guess.

(Testimony of W. A. Hesse.)

Q. What would be your judgment?

A. I suppose it is about 9 feet.

Witness excused. [56—17]

Testimony of A. E. Lathrop, in His Own Behalf (Recalled).

A. E. LATHROP, recalled.

Direct Examination (Continued).

(By Mr. DONOHOE.)

Q. Did you in the year 1908, the summer or fall of 1908, have any occasion from that time on, to pass through, over and upon Burkhart Alley as described in Plaintiffs' Exhibit "A"? A. Yes, sir.

Q. Do you know of any demands made by the city authorities to keep Burkhart Alley, as described in Plaintiff's Exhibit "A," free from obstruction, from the time it was laid out in the fall of 1908 up to the present time?

Mr. MEDLEY.—We object to that question; it is not the best evidence.

The COURT.—He is asked what he knows about it. He may answer—defendants allowed an exception.

A. I know as a councilman our chief had orders to keep the alley open and I know as a transfer man and I was instructed many times not to block the alley with freight, groceries, etc., when McDonald & Reedy had their store there and they wanted to keep the passageway open for hose carts in case of fire.

Q. Have you traveled over this Burkhart Alley to

(Testimony of A. E. Lathrop.)

any great extent from the year 1908? A. Yes, sir.

Q. Do you know of the defendant Slater in any manner obstructing this alley in the summer or fall of 1919? A. Yes, sir.

Q. What obstruction, if any, did Mr. Slater place upon the alley? A. Fence.

Q. How much of the Burkhart Alley did he fence in? A. His four feet.

Q. Describe what you mean by his four feet.

A. The four feet that was dedicated or used by the public—the four feet that he set his building back, or the original owners set [57—18] it back.

Q. You mean the four feet lying on the southerly side of the side line of Lot 7, Block 7?

A. Yes, sir.

Q. And did he after the commencement of this suit remove that obstruction? A. Yes, sir.

Q. Do you know of the defendant, the Bank of Alaska, placing any obstruction immediately thereafter in Burkhart Alley?

A. They placed a fence four feet on their side.

Q. On the northerly side of Lot 8? A. Yes, sir.

Q. That has since been removed also, has it?

A. Yes, sir.

Q. Do you know of the defendants announcing or threatening to close the portion of Burkhart Alley where it passes over Lots 7 and 8 in Block 7, that is, the portion of the alley between the buildings on Lot 7 and Lot 8? A. Yes, sir.

Q. And unless an injunction is granted against these defendants to restrain them from closing the

(Testimony of A. E. Lathrop.)

alley, do you know whether they intend to close that portion of the alley? A. Do I know?

Q. Yes. A. Yes.

Q. How many years during your residence in Cordova have you been a member of the Municipal Council? A. Three or four terms.

Q. A term covering one year? A. Yes.

Q. Do you know whether the owners of Lot 7 or Lot 8 in Block 7 [58—19] at any time objected to the public traveling upon this alley, previously?

A. No, sir.

Q. Was there ever any objection made to you by the owners of these two lots against your traveling on this alley as a public thoroughfare? A. No, sir.

Q. Did you ever hear of Robert Ashland or any other owner of Lot 7 in Block 7, making any objection to the public freely using this alley, prior to the time when Mr. Slater placed this obstruction thereon.

Mr. MEDLEY.—We object to the question as incompetent.

Objection overruled; defendants allowed an exception.

A. No, sir.

Q. Do you know of any owner of any building on Lot 8 in Block 7 ever making any objection to the public using Burkhart Alley freely as a public highway? Same objection; overruled; defendants allowed an exception. A. No.

Mr. DONOHUE.—That will be all at this time.

(Testimony of A. E. Lathrop.)

Cross-examination.

(By Mr. GRAHAM.)

Q. When the building now known as the Bank of Alaska, Cordova, was erected on Lot 8 in Block 7, which is on the south side of the so-called Burkhart Alley, the north wall of that building was set back 4 feet from the line between Lots 7 and 8, as I understand you? A. Yes.

Q. And that was only on the street level—that wall extended from [59—20] the street level up to the second floor of the building? A. Yes, sir.

Q. And then the second floor of the building extended northerly to the line between Lots 7 and 8?

A. Yes, sir.

Q. Now, the same condition existed with the construction of the building on Lot 7 in Block 7 just acrossed the so-called alley? A. Yes, sir.

Q. So that the two buildings joined at the property line between Lot 7 and Lot 8 from the second floor up? A. Yes, sir.

Q. Something like ten feet above the street walk?

A. Yes, sir.

Q. And that condition has existed ever since those two buildings were constructed, has it not?

A. Yes, sir.

Q. And from a point about ten feet above the street level, the whole of the area on Lots 7 and 8 in Block 7 has been occupied by the then owners of those lots respectively during all that time?

A. They rented it you mean?

Q. Yes. A. It was in their possession.

(Testimony of A. E. Lathrop.)

Q. And they were exercising dominion and control over it all that time? A. Yes, sir.

Q. That condition has existed ever since the Bank of Alaska building was constructed on Lot 8 in Block 7 and ever since the other building acrossed the so-called alley was constructed, which joins it with the other? [60—21] A. So far as I know, yes.

Q. And the respective owners of those two buildings have leased, rented and occupied all of that area during all of that time, with the exception of this hallway formed by the two buildings below the second floor?

A. I wouldn't say it has been leased, rented and occupied during all of that time—there was a period it was quiet.

Q. You don't know that it was not so occupied?

A. Yes, I do.

Q. There was a period— A. Yes, sir.

Q. That was a period when business was dull?

A. Yes.

Q. That was the only reason it was not occupied?

A. As far as I know the only reason.

Q. But it was in the possession and under the control of the owners of these respective lots during that period? A. Yes, sir.

The COURT.—I don't suppose there is any confusion but in the record you speak of area—it is really space instead of area; the record, however, fully discloses the situation.

Q. Now, take the building known as the Bank of Alaska, that had a sort of store building facing on

(Testimony of A. E. Lathrop.)

First Avenue, did it not? A. Yes, sir.

Q. And then back of the store building was some other space in the main building which was used by the owners of the building? A. Yes, sir.

Q. That space had an entrance on to this hallway or so-called alley? A. Yes, sir. [61—22]

Q. Now, the fact is the same condition obtained with reference to the building on this side?

A. Yes, sir. ,

Q. The building on the north side of the so-called alley, immediately north of the Bank of Alaska building, was occupied by Mr. Ashland for a period as a saloon? A. Yes, sir.

Q. A good share of the time you have testified to here, was it not—up until the territory went dry?

A. Oh, no.

Q. About how long?

A. Why, I don't think Ashland was in there over three years, to my knowledge—I don't think any more than that.

Q. When you speak of handling liquors, etc., in this alley—those liquors were taken into this building that lies on the north side, immediately adjacent to the so-called alley?

A. They were taken into both buildings; both buildings were occupied by saloons.

Q. So in handling liquors through that alley, you took them into the alley and then into the buildings now owned by the defendants in this case?

A. No, we did not; the Transfer Company delivered them in the alley.

(Testimony of A. E. Lathrop.)

Q. They were intended for those buildings and the occupants of those buildings?

A. Yes, sir, and the merchants took them in.

Q. And the stuff you had occasion to deliver there while you were in the business of transfer and delivery, and delivered through the alley from First Avenue, went to the owners or other tenants in these two buildings?

A. To the owners or the tenants; yes, sir.
[62—23]

Q. Now, then, First Avenue, on the westerly side of which your building is located, is intersected and crossed at the north end of the block in which your building is located by C Street, is it not? A. Yes, sir.

Q. And C Street extends from the city dock at the waterfront, easterly, over and acrossed First Avenue, intersects and crosses Second Avenue, Third, Fourth and Fifth, and runs on up the hill clear to the limit of the occupied settled portion of the town of Cordova, does it not?

A. Yes, sir.

Q. Now, upon the south end of the block in which your building is located another street called B Street runs from a point westerly of the lot on which your building is located, northerly, intersects and crosses First Avenue, continues easterly, intersects and crosses Second Avenue, Third Avenue, Fourth Avenue, etc., on to the easterly limit of the occupied and settled portion of the town of Cordova? A. Yes, sir.

(Testimony of A. E. Lathrop.)

Q. In fact, to the easterly limits of the platted town? A. Yes.

Q. Those two streets are graded streets, are they not?

A. I don't know whether they are graded—they are graded up to Fourth Street; this is only graded to Fifth or Sixth.

Q. It is graded to a point two or three blocks easterly of your building? A. Yes, sir.

Q. And sidewalks and foot travel on either side? A. Yes, sir.

Q. Those are regularly laid out dedicated streets? [63—24] Yes, sir.

Q. So that the public of the town of Cordova, people traveling over the town, desiring to go from one place to another in the town, have access to your building from all portions of the town by First Avenue and streets intersecting and crossing First Avenue on either end of the block in which your building is located? A. Yes, sir.

Q. People residing on Second Avenue between B Street and C Street in the town of Cordova have access to your building over public streets, B Street and C Street, do they not?

A. Oh, yes.

Q. The closing of the cross-walks which you mention as being something like 75 feet, I don't remember the distance, but the Clayson sidewalk which extended from opposite Clayson's store acrossed First Avenue between B and C Streets, was a privately built walk, was it not? A. Yes.

(Testimony of A. E. Lathrop.)

Q. And was not substantial or kept up?

A. Yes, it was—it was an excellent cross-walk.

Q. How about the so-called Boyle cross-walk, extending from opposite the Cordova drugstore?

A. That was privately built but not as good a cross-walk.

Q. About these lots—the complaint sets forth that you are the owner of Lots 23, 24 and 25 in Block 2 and I believe you testified you own 22, 23 and 24— A. No.

Q. It is 24, 25 and 26? A. Yes, sir.

Q. There is no record title to Lots 25 and 26, is there? A. Not here; no. [64—25]

Q. Since the postoffice was moved to the westerly side of First Street, the travel on the westerly side of First Avenue has materially increased, has it not? A. Yes.

Q. And since your building was constructed and the tenants went into the use of it, that has increased the travel on the westerly side of First Street, has it not? A. Yes.

Q. Prior to the erection of your building, and prior to the location of the postoffice on the westerly side of First Street, there were few business enterprises on that side of the street?

A. Very few.

Q. So that the increase in the travel on the westerly side of First Street has been due very largely to the erection of your building and its occupancy and to the moving of the postoffice to the westerly side? A. Yes.

(Testimony of A. E. Lathrop.)

Q. How many apartments are there in this Burkhart Building?

A. I am not able to answer that, there are a great number, but very small.

Q. Have you any idea how many tenants there are?

A. I would say there are not less than 20 apartments.

Q. A great deal of the travel, a considerable portion of the travel, on this so-called Burkhart Alley during the past consisted of people going to and from places of business which were located on the alley? A. No.

Q. You spoke of a restaurant having been located on the alley? A. Yes, sir.

Q. There was more or less travel to that restaurant? [65—26] A. Yes, sir.

Q. Practically all the travel to and from that restaurant was on that alley?

A. That was the only way they could reach the restaurant.

Q. The people in the Burkhart Flats, these tenants, used the alley more or less, did they not?

A. Yes.

Q. And people having occasion to go to the saloon or to take supplies to the saloon, etc., either saloon, on either side of the alley, the time the saloons were maintained there, used the alley for that purpose? A. Yes.

Q. In other words, the alley was used during practically all this time by the owners of the build-

(Testimony of A. E. Lathrop.)

ings for their private use, in addition to what public travel there was through there?

A. Yes, sir.

Q. A sort of joint use, then? A. Yes, sir.

Q. Partly private and partly public—is that the case?

A. I don't know how you could call it private.

Q. A good portion of the people who used the alley used it to do business with the businesses that were located on the alley and a part of the people simply used the alley to go back and forth—some wanted to go clear through and some part way—is that the case?

A. The private use of the alley in Ashland's case was when his family lived upstairs; the balance of it was public.

Q. In Ashland's case—what building was that?

A. That was the building on the north side of the alley.

Q. And used also in taking his stock of liquor, etc., into the back portion of his saloon? [66—27]

A. Yes, sir.

Q. And on the other side, what did the private use consist of?

A. Burkhart had a waffle-house on the other side.

Q. That is in the building now known as the Bank of Alaska Building? A. Yes, sir.

Q. And the travel to that portion was to and from that business? A. Yes, sir.

Q. And over the building on the north side of the alley where you say Ashland's saloon was—that was

(Testimony of A. E. Lathrop.)

on the north side? A. Yes.

Q. For a good portion of this time the upper portion of that building was used for roomers and lodgers—apartments? A. Yes, sir.

Q. And the entrance to that was through the alley? A. Yes, sir.

Q. So people had to use the alley to reach those apartments? A. No, they didn't have to use it.

Q. But they did?

A. They could have gone around—the door leading upstairs over the Ashland property is right on the end of the building, so you could go in there from the side alley.

Q. They could have gone around and used the side alley to go in there or taken the shorter cut and used the so-called Burkhart alley? A. Yes.

Q. And gone under the portion of the building which was over the alley and been indoors, practically? A. Yes, sir.

Q. It was practically an indoor walk through there? A. Yes, sir.

Q. Protected from storm? [67—28] A. Yes.

Q. And no snow in there? A. No.

Q. The construction of the building over it practically enclosed it? A. Yes, sir.

Q. Captain Lathrop, in your estimate of the amount of travel that went through this Burkhart Alley, you didn't take into consideration the number of teams and autos and travel on B Street and C Street, that kind of travel—there is no travel of that kind through the alley? A. No.

(Testimony of A. E. Lathrop.)

Q. In this estimate of yours on the amount of travel that went through the alley as compared with the amount on B Street and C Street—that all occurred long before there was any controversy over the alley, before constructing your building; that is what you are speaking of now when you say there was something like 80% of the travel—and when the postoffice was in the Ostrander Building—went through the so-called alley?

A. I base my estimate on the travel through the alley during the period the postoffice was on Second Avenue.

Q. And that was before you constructed your building?

A. Yes, sir; that was before I constructed my building.

Q. And before you had any reason to observe closely the amount of travel through the alley as compared with the others? A. No.

Q. You had no occasion to observe it?

A. Yes, I couldn't help to take notice of it.

Q. You noticed it before—you had business reasons for noticing it? You never made a census of the travel, never checked it up and counted the number of vehicles and teams and persons that used B and C Streets—did you ever do that? [68—29]

A. Why, no.

Q. And you never counted the number of persons that went through Burkhart Alley in any given length of time? A. No, sir.

Q. You never counted the number of persons that

(Testimony of A. E. Lathrop.)

walked on B Street and C Street? A. No, sir.

Q. Your estimate, then, is purely a guess, as you would simply make an estimate of it now, some years after the situation has changed.

A. Well, I am not quoting that from actual count.

Q. I thought my question was rather fair. I would like to have you answer it—it is really an estimate made after a year or two, since the conditions have changed which affected that travel?

A. No.

Q. When did you first make this estimate?

The COURT.—You have asked him about an estimate and about a guess—the first question was whether or not this was not just a guess and now you ask whether it is an estimate.

Mr. GRAHAM.—I will withdraw the question about the guess and eliminate that.

Q. When did you first make this estimate of the amount of travel that you give us now—that you gave a little while ago?

A. I made it right here.

Q. Is that the first time you have estimated in your mind the amount of travel in this alley as compared with B Street and C Street, during the time the postoffice was in the Ostrander Building?

A. It is not.

Q. When was the first time?

A. When I was on the Council a question came up regarding the upkeep [69—30] and lights, etc., and about the travel through the alley and on

(Testimony of A. E. Lathrop.)

the streets; that question came up.

Q. How long ago was it that the postoffice was moved from the Ostrander Building?

A. During the "flu" time, this last winter.

Q. About a year ago?

A. Just about a year ago.

Mr. GRAHAM.—That's all.

(By Mr. DONOHUE.)

Q. Counsel for the defendants has asked you about the travel through Burkhart Alley, and he asked you the question, was the alley not used jointly by the occupants of buildings along the alley, as well as by the public, and I think you answered him "Yes?" I will ask you now if the use of Burkhart Alley, whether privately or publicly, was not the same as the use of the sidewalks on any of the streets in the town of Cordova?

A. Just the same.

Q. Burkhart Alley was not a way where you could take teams or autos or trucks through?

A. No, sir.

Q. It was used solely for foot-passengers, foot travel? A. Yes.

Q. You said you made an estimate as to the extent to which Burkhart Alley was used by the public when you were on the Council and the reason for that was there was a request for some light, for the city to put in lights in the alley—

Mr. GRAHAM.—We object to that.

Mr. DONOHUE.—I will withdraw that question. [70—31]

(Testimony of A. E. Lathrop.)

Q. Do you recall at any time during the years you were a member of the Council when a question came up before the Council of lighting Burkhart Alley, furnishing lights? A. Yes, sir.

Q. State what was done in that connection by the City Council.

Mr. GRAHAM.—We object unless he shows when this occurred, what date, etc., and I think the records of the City Council are the best evidence anyway.

Mr. DONOHUE.—I will withdraw the question at this time. We will take that up later. That is all, Mr. Lathrop.

Witness excused. [71—32]

Testimony of Alice Johnson, in Her Own Behalf.

ALICE JOHNSON, one of the plaintiffs, called and sworn in her own behalf, testified as follows:

Direct Examination.

(By Mr. DONOHUE.)

Q. What is your name? A. Alice Johnson.

Q. Where do you reside?

A. In the Burkhart Apartments.

Q. Town of Cordova, Alaska? A. Yes, sir.

Q. You are one of the plaintiffs in this action?

A. Yes, sir.

Q. When did you first live in Cordova?

A. I came to Cordova in 1910—May 16th.

Q. Have you lived here a good portion of the time ever since? A. About half of that time.

(Testimony of Alice Johnson.)

Q. After you were here for a while you went into the Interior? A. Yes, Chitina.

Q. And when did you return to live in Cordova permanently? A. 1916.

Q. Are you the owner of Lot 25 in Block 7 of the town of Cordova or have you a contract for the purchase of that lot? A. Yes, sir.

Q. You have such a contract? A. Yes, sir.

Q. I hand you a paper and ask you if that is the contract which you have for the purchase of Lot 25, Block 7? A. Yes, sir.

Mr. DONOHOE.—We offer this in evidence.

(The contract is admitted in evidence, without objection; is marked Plaintiffs' Exhibit "B," and copy is attached hereto and [72—33] made a part hereof.)

Q. When did you enter into this contract to purchase for Lot 25 in Block 7 as set forth in Plaintiffs' Exhibit "B," in this paper, this contract?

A. July 6, 1918.

Q. What is the purchase price for this lot?

A. \$5,000.

Q. How much did you pay down on the signing of this? A. One thousand dollars.

Q. And did the contract provide for \$100 monthly payments? A. Yes, sir.

Q. And how many of those payments have you made? A. Seventeen, I think it is.

Q. That makes a total payment on this property, on the purchase price, of \$2,700? A. Yes, sir.

(Testimony of Alice Johnson.)

Q. Have you paid all the monthly payments required by the contract to purchase?

A. Yes, sir.

Q. And you have been in possession of the property since some time in July, 1918?

A. Yes, sir.

Q. Are you renting the various apartments you have in that building? A. Yes, sir.

Q. Were you familiar with Burkhart Alley when you were residing in Cordova in 1910?

A. Yes, sir.

Q. Did you pass over it from time to time?

A. Yes, sir.

Q. When you returned to Cordova in 1916, and before you entered into [73—34] this contract to purchase Lot 25, did you have occasion to observe Burkhart Alley? A. Yes, sir.

Q. And the amount of travel that passed through it?

A. I never closely observed the amount of travel, but I always used it in preference to any other street.

Q. Did you use it freely and without any permission from anyone? A. Yes, sir.

Q. Now, when you started to negotiate for the purchase of this Lot 25—did you have knowledge at that time that the Burkhart Alley had been used at least since 1910 generally by the public?

A. Yes, sir.

Q. Was the fact that Burkhart Alley was laid out and being used generally by the public one of

(Testimony of Alice Johnson.)

the inducements that induced you to buy that property for \$5,000?

Mr. GRAHAM.—We object to that as not within the pleadings in the case. There is no pleading of estoppel and it is immaterial and irrelevant, and on the further ground that the contract introduced in evidence is a contract for the conveyance to her of the entire lot to the center of the alley; there is no reservation in the contract of any portion of the lot.

Objection overruled; defendants allowed an exception to the ruling.

A. Yes, sir.

Q. Miss Johnson, how many apartments have you in your building on Lot 25? A. Twelve.

Q. And what is the nature of the building—what is the dimensions and size of the building, about, approximately?

A. I would say about 22 by 100.

Q. And how many stories in it, how many floors? [74—35] A. Two and the basement.

Q. You rent those twelve apartments to people, to residents? A. Yes, sir.

Q. And in the basement of the building have you a laundry?

A. Yes, sir; a laundry and bathroom.

Q. Did you at any time as the owner of Lot 25, Block 7, consent to the closing of Burkhart Alley?

A. No, sir.

Q. Now, what, in your opinion, would be the damage done you by the reduced value of your

(Testimony of Alice Johnson.)

property, Lot 25, Block 7, and also the reduced revenue that you could obtain from Lot 25 if the westerly part of Burkhart Alley was closed, and by the westerly part, I mean that portion of the alley running between the Alaska Bank and the Northern Drugstore, at this time?

A. Well, I would say at the very lowest it would be 25%, if not 50%.

Q. Where is the principal business street of the town of Cordova? A. First Street.

Q. If you or your tenants have business on First Street, how do you travel to get to First Street, from your building?

A. Through the Burkhart Alley.

Q. Now, if the westerly portion of Burkhart Alley was closed, how would you then proceed to get to First Street, if you had business there?

A. Well, we would have to go through the city alley or go up around Second Street. up around the next street.

Q. You mean the city alley running north and south running north and south through Block 7?

A. Yes.

Mr. DONOHOE.—That's all. [75—36]

Cross-examination.

(By Mr. GRAHAM.)

Q. Is it Miss or Mrs. Johnson?

A. Miss Johnson.

Q. This lot you speak of for which you have the contract to purchase fronts on Second Avenue?

A. Yes, sir.

(Testimony of Alice Johnson.)

Q. And Second Avenue connects with B Street and C Street on either side? A. Yes.

Q. So you have an open public highway, made an open public highway, from the alley around on either B or C Street to First Avenue, the principal portion of the town?

A. Yes, from Second Street.

Q. Your property also abuts on the public alley which runs north and south through Block 7?

A. Yes, sir.

Q. So you have access to the rear portion of your premises from this alley that runs north and south?

A. Yes, sir.

Q. What is the number of the lot this building is on, that you have a contract to purchase?

A. I think it is 25.

Q. A portion of that building extends nearly to the line between the two lots, does it not, the centre of the alley? A. I didn't get that.

Q. A portion of the building you are occupying extends nearly to the centre, between your lot and the next lot, north of the lot you occupy?

A. Yes, sir.

Q. There isn't a four-foot strip left open there?
[76—37] A. No.

Q. On your side? A. No.

Q. It is only about 18 inches? A. Two feet.

Q. About two feet? A. Yes, sir.

Q. Isn't that little walk that leads from Second Avenue back along the north side of the building you occupy something over 2 feet wide?

(Testimony of Alice Johnson.)

A. Just 2 feet wide.

Q. So that you are now occupying at least two feet of the southerly portion of this so-called Burkhart Alley with your building?

A. Well, I am occupying a part of the four feet.

Q. In other words, you are occupying one-half of the south half of the so-called Burkhart Alley?

A. Yes, sir.

Q. And you have for some time?

A. It was that way when I purchased it.

The COURT.—You speak of a building and speak of a walk. Is it the contention that that is a part of the building itself, that two feet of that is over on the 8 ft. strip or is it the walk you speak of?

Mr. MEDLEY.—This is a high walk and it is part of the building, like a piazza.

Q. This two feet walk you speak of doesn't run on the same level as the sidewalk in this so-called alley?

A. No, it is connected with the building.

Q. And about the same height as Second Avenue there? A. Yes, sir.

Q. So the public traveling from Second Avenue to First Avenue, if [77—38] they wanted to use this Burkhart Alley, couldn't use that southerly two feet of the alley? A. No.

Q. How long did you say you had been about Cordova? A. I came here in 1910.

Q. That was the first time you were here?

A. Yes.

(Testimony of Alice Johnson.)

Q. How long did you live here then?

A. Until September, 1910.

Q. What month did you come here in 1910?

A. In May.

Q. You lived here from May until September, 1910? A. Yes.

Q. Then where did you go? A. Chitina.

Q. When did you return to Cordova to live after that? A. 1916.

Q. What month did you return in 1916?

A. I really don't remember.

Q. Was it the early part or the latter part?

A. I think it was the latter part of 1916, about August.

Q. Then from the time you left Cordova and went to Chitina and came back here you were not familiar with the use of that alley by anybody?

A. Well, I passed through here quite often and was here on a visit quite often.

Q. When you were here on visits, did you go through that alley? A. Yes, sir.

Q. And you went through the alley you say when you lived here in 1910? A. Yes. [78—39]

Q. When you went through that alley you passed through a hallway, did you not, in getting to First Avenue?

A. I noticed the alley all the way through—I didn't notice there was a hallway.

Q. You didn't notice there was a hallway through there, but it was roofed over above you?

A. Yes, I noticed it was roofed over, of course.

(Testimony of Alice Johnson.)

Q. You noticed when you went on that alley and started to go through it, that you were going along a building? A. Yes, sir.

Q. And that it was walled up on both sides?

A. Yes, sir.

Q. Pretty close? A. Yes, sir.

Q. And the snow couldn't fall in there?

A. Yes, sir.

Q. Roofed over so it couldn't get in? A. Yes.

Q. You noticed above the walk was a continuation of buildings, above the premises occupied there?

A. To tell the truth, I didn't notice that.

Q. You never looked up at all? A. No.

Q. But you did notice it was occupied or noticed it was built over? A. I never noticed that.

Q. Have you lived here continuously since you returned here in 1916? A. Yes, sir.

Q. You went through that alley a good many times prior to that time? A. Yes, sir.

Q. Now, I would like to have the witness state, so I may understand it and that the record may show, whether during the numerous times [79—40] she went through that alley, she noticed there was some obstruction overhead, that it was roofed over?

A. As I said before, I never paid any attention to the overhead; I never noticed it.

Q. You never noticed it was roofed over in any manner? A. No, sir.

Q. And you say you have been through it a great many times? A. Yes, sir.

(Testimony of Alice Johnson.)

Q. You testified a while ago that the snow never fell there?

A. I never walked in snow there.

Q. How do you know the snow hadn't fallen there? A. I never saw it on the ground.

Q. What did you think prevented the snow coming in there?

A. I had an idea it was an overhead covering, but I never noticed it.

Q. But you really believed there was such a covering there? A. Yes, sir.

Q. But didn't take the trouble to glance up and see just what it was? A. No, sir.

Q. It may have been any sort of overhead covering as far as you can tell?

A. I was just going through—it was convenient for me.

Q. In your contract for the purchase of Lot 25 in Block 7, the contract reads, giving a description of the property, being Lot 25 in Block Number 7, according to the map and plat thereof, recorded in the office of the recorder of the Cordova Recording District of Alaska, in Book of Deeds Number—giving the book and page number, etc., and your contract calls for the conveyance of the lot clear to the centre of this so-called alley, does it not? [80—41]

A. Well, I don't know.

Mr. DONOHUE.—The contract calls for the full lot.

Mr. GRAHAM.—That's all.

(By Mr. DONOHUE.)

Q. In reference to your building on Lot Number

(Testimony of Alice Johnson.)

25, I will ask you if the north wall of your building, the building proper, is four feet from the north line of Lot 25? A. The building is four feet; yes, sir.

Q. And there is a walk two feet wide, you say?

A. Yes, sir.

Q. Running from the Second Street level?

A. Yes.

Q. And then there is another walk two feet wide starting from a point on Burkhart Alley running along the buildings to the rear?

A. Both of these walks are the public thoroughfare.

Q. One starts from the grade of Burkhart Alley going towards the west? A. Yes, sir.

Q. Is that condition now the same as it was when you first observed it in 1910 or when you did observe it? A. Yes, sir.

Q. There has been no change in the walk since you first observed it? A. No, sir.

Q. Or in the building? A. No, sir.

Q. And there has been no encroachments made upon Burkhart Alley by any structure you have in your building since you first observed the manner and the width of Burkhart Alley at that point? [81—42] A. No, sir.

(Questions by the COURT.)

Q. Now, Miss Johnson, as I understand it and as you understand it probably, from walking through there many times, this alley which runs along the side of your lot is on a kind of slope or incline?

A. Yes, sir.

(Testimony of Alice Johnson.)

Q. What is the purpose of these walks which you have spoken of that are built out in the alley?

A. They are entrances to the apartments.

Q. In other words, it would be presumed that the floors in your house are level? A. Yes, sir.

Q. And these walks, as I understand it, are for the purpose of getting into the building?

A. Yes, sir.

Q. Is that the sole use it is put to?

A. Yes, sir.

Q. The building itself, that is, speaking of the building and not the walks, is how far back from the line?

A. Well, it is two feet back; the building itself besides the walk is four feet back—the wall of the building is four feet back.

(By Mr. DONOHOE.)

Q. Now, Miss Johnson, on the Second Street end of your lot, what is the small building there occupied with? A. It is a tailor-shop.

Q. That is separate from your apartment building? A. Yes, sir.

Q. And to get to the entrance to the lower floor of your apartment you must enter the alley some distance before you can get to this narrow 2-foot walk along the side of your building? A. Yes, sir.

Q. And there are two feet of your lot that is in the Burkhart Alley proper? A. Yes, sir.

Witness excused.

Recess to 2 P. M. [82—43]

Thursday, December 11, 1919.

AFTERNOON SESSION.

Testimony of K. G. Robinson, for Plaintiffs.

K. G. ROBINSON, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHUE.)

Q. State your name and residence.

A. K. G. Robinson; Cordova.

Q. How long have you resided in Cordova?

A. Since 1911.

Q. What official position do you hold in the town of Cordova at this time?

A. City Clerk and Municipal Magistrate.

Q. As City Clerk are you the custodian of the minute-books of the Common Council of the town of Cordova? A. I am.

Q. Have you Volume One of the minute-books of the proceedings of the Common Council of the town of Cordova? A. I have.

Q. Will you please turn to page 219, under date of June 3, 1912—is there a record there of the proceedings of the Common Council of the town of Cordova? A. Yes, sir.

Q. What meeting is that you have recorded there? Minutes of what meeting?

A. Minutes of the meeting of the Common Council of the town of Cordova held at the town hall, at 8 o'clock P. M. June 3, 1912.

Q. Read from page 219 any reference that is

(Testimony of K. G. Robinson.)

made there in the minutes in regard to Burkhart Alley in the town of Cordova?

Mr. GRAHAM.—We object to that unless it is shown that these defendants were present or represented at that meeting.

Mr. DONOHOE.—The purpose of the testimony is to show acts of ownership [83—44] exercised over this alley by the Town Council. I was about to attempt to show it this morning by a member of the Common Council and it was objected that the minutes were the best evidence.

Mr. GRAHAM.—The minutes would be the best evidence of what took place providing it was binding on these defendants, but any action taken, not brought home to these defendants, which caused these defendants to do something with reference to that property, would have no binding effect whatever upon the defendants in this case.

The objection was by the Court overruled; to which ruling of the Court counsel for defendants is allowed an exception.

A. (Witness reading:) The Committee on Fire Protection reported that the Cordova Power Company would put in a hydrant on First Street at Burkhart Alley if the town would pay the actual cost of cutting the main and other work except the cost of the hydrant. The matter was postponed until the next meeting of the Council.

Mr. GRAHAM.—Defendants move to strike the answer of the witness on the ground that it is irrelevant and immaterial.

(Testimony of K. G. Robinson.)

Which motion was by the Court denied and defendants allowed an exception to the ruling.

Q. Now, turn to page 220, under date of June 17, 1912, and read any action of the Common Council that is there reported in regard to Burkhart Alley.

Mr. GRAHAM.—We make the same objection.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) The Chief of police was directed to notify owners to repair walk in Burkhart Alley.

Mr. GRAHAM.—The defendants move to strike the answer, on the same grounds. [84—45]

Motion denied; defendants allowed an exception.

Q. Turn to page 234, under date of October 21, 1912, and read any record that appears there of actions taken by the Common Council of the town of Cordova in reference to Burkhart Alley.

Mr. GRAHAM.—Same objection.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) Notice was given that a street light was wanted in the alley at the intersection of Burkhart Way and at various other points. The matter was referred to the Committee on Light with authority to use their own judgment in ordering new lights.

Mr. GRAHAM.—We move to strike the answer on the ground that it is incompetent, irrelevant and immaterial.

(Testimony of K. G. Robinson.)

Motion denied; defendants allowed an exception.

Q. Now, turn to page 321, under date of May 18, 1914, and read any record there in reference to Burkhart Alley.

Mr. GRAHAM.—We object to the question on the ground that it is incompetent, irrelevant and immaterial.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) The Fire Committee recommended that a fire hydrant be placed at each end of the Burkhart Alley in the middle of Block 7, and the chief of the fire department be also made fire warden.

Mr. GRAHAM.—We move *the* strike the answer on the ground that it is incompetent, irrelevant and immaterial and is not binding on the defendants.

Motion denied; defendants allowed an exception.

Q. Turn to page 323 under date of May 18, 1914, and read the record there with reference to Burkhart Alley.

Mr. GRAHAM.—We make the same objection.
[85—46]

Objection overruled; defendants allowed an exception.

A. (Witness reading:) Mr. H. I. O'Neill addressed the Council calling attention to the necessity of a light at the Burkhart Alley on Second Street and suggested that the lamp-post a short distance north be removed to that point, and also that a rail-

(Testimony of K. G. Robinson.)

ing be placed— That is as far as it goes on that subject.

Mr. GRAHAM.—We move to strike on the same grounds.

Motion denied; defendants allowed an exception.

Q. Turn to page 332, under date of June 6, 1914, and read any record there with reference to Burkhart Alley.

Mr. GRAHAM.—Same objection.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) It was moved and seconded that the placing of hydrants on First and Second Streets opposite Burkhart Alley be referred to the Fire Committee with power to act. The motion prevailed.

Mr. GRAHAM.—We move to strike the answer on the same grounds.

Motion denied; defendants allowed an exception.

Q. Turn to page 348, under date of September 14, 1914, and read any record there with reference to Burkhart Alley?

Mr. GRAHAM.—We make the same objection, and wish to have it apply to all these questions.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) The matter of placing hydrants at each end of Burkhart Lane was discussed. Mr. Hazelet stated that the hydrants had been ordered and would be placed as soon as they arrived.

(Testimony of K. G. Robinson.)

Mr. GRAHAM.—I should also like to have it understood that the defendants move to strike the answer in each case, that the motion is denied and defendants allowed an exception.

By the COURT.—Very well. [86—47]

Q. Now, turn to page 357, under date of October 19, 1914, and read what you find there with reference to Burkhart Alley.

A. (Witness reading:) The Committee on Light and Water reported that hydrants had been placed on First and Second Avenues opposite the Burkhart Alley.

Q. Next, turn to page 437, under date of November 6, 1916, and read any record there with reference to Burkhart Alley.

A. (Witness reading:) It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired.

Mr. DONOHOE.—That is all.

Mr. GRAHAM.—No cross-examination.

Witness excused. [87—48]

Testimony of George Dooley, for Plaintiffs.

GEORGE DOOLEY, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name and residence?

A. George Dooley; Cordova, Alaska.

(Testimony of George Dooley.)

Q. How long have you resided in the town of Cordova, Alaska?

A. Since November 19, 1907.

Q. Have you held any official positions in the town of Cordova during your residence here?

A. I have.

Q. What official positions did you hold in the town of Cordova from the time of the organization of the town, which was in 1909, until some time in 1910?

A. Chief of the fire department and chief of police.

Q. During 1910, 1911 and up to April, 1912, what position did you hold?

A. The same position.

Q. Did you again occupy an official position in the town of Cordova, later on? A. I did.

Q. During the years 1915 and 1916 and until November, 1917, what official position did you occupy?

A. Chief of police and chief of the fire department.

Q. As chief of police was it part of your duties and as chief of the fire department to follow out instructions given you by the Common Council for various purposes? A. It was.

Q. Are you familiar with the alley, from First to Second Streets in the town of Cordova, occupying four feet on the east side of the dividing side lines between Lots 7 and 8 and between Lots 25 [88—49] and 26, Block 7, in the town of Cordova, known as Burkhardt Alley? A. I am.

(Testimony of George Dooley.)

Q. When was Burkhart Alley first opened up, laid out?

Mr. GRAHAM.—We object to that question; it has not been shown it was laid out.

The COURT.—I take it the part of the question “opened up” was intended to take the place of the words “laid out.”

Mr. DONOHOE.—That is the idea—I didn’t mean to say it was officially laid out.

The COURT.—Answer the question.

A. In 1908.

Q. Were you in the town of Cordova in 1908 when Robert Ashland constructed a building on Lot 7 in Block 7 of the town of Cordova, which is the building that now occupies that lot?

A. I was.

Q. Will you describe how far the south wall of that building was erected from the south line of Lot 7?

The COURT.—It is admitted that it was four feet.

Mr. GRAHAM.—The lower story; yes.

A. I would say about four or five feet—I have never measured it; I judge it is eight or ten feet wide there.

Q. Were you in the town of Cordova when the building was erected by Mr. Burkhart on Lot 8, Block 7? A. Yes, I was.

Q. After those buildings were erected, the one on Lot 7 and the one on Lot 8, was there any space, ground, left between those buildings?

(Testimony of George Dooley.)

A. There was an alleyway between the two buildings; yes, sir.

Q. About what is the width of that alley?

A. I should judge between eight and nine feet, possibly eight feet—I [89—50] have never measured it exactly.

Q. Were you in the town of Cordova when Mr. M. Finklestein erected his building on Lot 26 in Block 7 of the town of Cordova; that is, the lot now known as the Carsten lot?

A. I wasn't exactly in the town; I was deputy marshal at that time and resided in the old town and was in town every day.

Q. You were familiar with how that building was erected in reference to the south line of the lot?

A. Yes.

Q. And was there the same space of about four feet left along the south side of Lot 26 when Mr. Finklestein erected his building? A. There was.

Q. Were you in the town of Cordova when Mr. Burkhart erected his building on Lot 25, Block 7?

A. That is the apartment?

Q. Yes. A. I was.

Q. Do you know what space was left along the northerly side of Lot 25 in Block 7 when that building was erected?

A. That is the building on Second Avenue?

Q. That is the lot on Second Avenue, the building, on which the Burkhart Apartments are situated? A. Yes, sir.

(Testimony of George Dooley.)

Q. Describe to the Court the situation along there.

A. The grade on Second Avenue is higher than that on First; there is a runway down that, quite a walk; I should judge it is 6 feet wide, from the Carsten or Finklestein building; it runs down on an incline say twenty or thirty feet to a point possibly six or seven feet below the grade of Second Avenue. Then there is a walk or platform that runs along the apartments which serves [90—51] as an approach or entrance to the apartments, on the first floor of the apartments. On the second floor there is a platform three or four feet wide joining the tailor-shop that runs back and raises possibly two feet and reaches another approach which runs back and serves as an entrance or approach to the apartments, on the second floor of the Burkhart apartments.

Q. Do you know approximately what the width of this approach, of these approaches, are?

A. I would say the approaches are between two and three feet, possibly $2\frac{1}{2}$.

Q. Then was there any other portion of Lot 25 left along the grade of the alley—in other words, was the wall of the building set back four feet from the north side line?

A. Yes, it was set back three or four feet.

Q. And you say two or $2\frac{1}{2}$ feet of that space was occupied by approaches?

A. Yes, sir, overhead, the first floor runs down from the level which I have described, it runs level

(Testimony of George Dooley.)

to that first floor and when it reaches the alley, it is above the alley and floor space is left right at the alley.

Q. What can you say as to when, if at all, this alley commenced to be used by the traveling public of Cordova?

A. I would say it was used in 1908—the exact time I wouldn't say. Burkhart first established a small bakery in the rear of the lot, off of First Avenue, and it started to be a thoroughfare at that time. I couldn't say without looking up some records just when that was used but it was 1908.

Q. It was some time during the year 1908?

A. It was some time during the year 1908. [91—52]

Q. What would you say as to the amount of travel that passed through that alley in reference to the amount of travel that passed along either B or C Street, in traveling from First to Second or from Second to First Street, foot travel?

A. The only observation I can make is that there was more travel through Burkhart Alley than there was on B or C Street.

Q. Burkhart Alley was never used for anything but for people walking or foot-passengers; in other words, it was not used for teams?

A. No, foot-passengers.

Q. Have you, at a recent date, within the past two or three months, been through Burkhart Alley and observed its condition, generally?

A. I have been there several times; yes, sir.

(Testimony of George Dooley.)

Q. Is the space or room for travel to be utilized the same now as it was when the alley was first opened up in the fall of 1908?

A. It is the same now.

Q. Are the approaches you have described along the building on Lot 25 the same as they were when the alley was first opened up?

A. They are, with the possible exception at one time there was an approach or viaduct from this approach I have mentioned over to the Finklestein building on the other side.

Q. Overhead.

A. Overhead—that was years ago. They used to enter the first floor of the Finklestein building in the rear, from the first floor of the Burkhart apartments. That was in 1909, I believe; with that exception the Burkhart alley is the same as when first erected.

Q. The overhead passage between the Finklestein building and the Burkhart apartments has since been taken down? A. Yes, sir.

Q. That overhead passage didn't in any way interfere with people [92—53] traveling on the grade up and down the alley? A. No.

Q. How high would you say it was from the floor of the alley?

A. Between 12 and 15 feet some place.

Q. Now, calling your attention to the buildings on Lots 7 and 8, the upper story, the second story of those buildings extends out over the alleyway and join, do they not? A. They do.

(Testimony of George Dooley.)

Q. What is the height would you say between the floor of the alley and the roof formed overhead by the extending out of the second story of each of these buildings?

A. I would judge about ten feet, possibly 11.

Q. Does it give ample room for using the alleyway conveniently for foot travel?

A. Yes, sir, it does.

Q. It in no way interferes with people using the alleyway who travel on foot? A. No.

Q. Do you know of Mr. Slater, one of the defendants here, placing any obstruction in Burkhart Alley, some time in September of this year, or August of this year?

A. I saw a fence there some time ago.

Mr. MEDLEY.—We admit the obstruction.

Q. From the time this alleyway was opened up in 1908 until this obstruction was placed in the alleyway by Mr. Slater, did you ever observe any obstruction, permanent obstruction, in the alley, that in any way interfered with its being used as a public highway?

A. That is the only one, with the exception of the fence moved acrossed on Lot 7, close to the bank; there was an obstruction placed there. [93—54]

Q. That was after?

A. That was after. That was the only permanent obstruction I have known in the alley.

Q. Have you yourself used that alley and passed through and over it and upon it various and many times since it was opened up in the fall of 1908?

(Testimony of George Dooley.)

A. I have used it quite frequently.

Q. Did anyone at any time forbid you to use it or attempt to stop your free use of it as a public thoroughfare? A. No, sir.

Q. Did you ever hear of anybody being requested not to use that alley as a public thoroughfare? A. I have not.

Q. Did you ever ask permission from anyone to use this alleyway? A. I did not.

Q. Now, what can you say as to the continued use of this alley by the public of the town of Cordova since the time it was first opened up in 1908?

A. I would say that it has been used as a continuous highway from that date until the obstructions have been placed there—when left open has been used continuously since 1908.

Mr. GRAHAM.—We move to strike the answer as a conclusion, using the word “highway.”

The COURT.—He said used as a highway—the answer doesn’t necessarily mean a public highway. Objection overruled and motion denied.

Defendants allowed an exception to the ruling.

Q. Do you know of the municipality of Cordova placing any lights or maintaining any light in the Burkhart Alley for the purpose of lighting it, like the lights on the other streets of the town?

A. I will state that the city maintained a light in the rear of the passageway, on the alley end of the passageway. That it [94—55] was my duty as a city officer to turn on and off, morning

(Testimony of George Dooley.)

and night, during my position as chief of the fire department, from 1915 to November, 1917.

Q. And from 1915 to November, 1917, you know of your own knowledge that the city maintained the light in the rear end of the passage extending from First Avenue back to the regular alley running north and south? A. Yes, sir.

Q. And was it your duty to turn that light on in the evenings and turn it off in the mornings?

A. It was.

Q. And do you know whether the city paid for that light, to the Light Company?

A. I understood it did—I enumerated it with the other city lights.

Mr. GRAHAM.—We move to strike what he understood.

Motion granted.

Q. Do you know anything of moving a street light on Second Avenue so it would be opposite the alley?

Mr. GRAHAM.—We object for the reason that anything the city did with the streets which was not in the alley could not be prevented or objected to by any of these property owners and is not binding upon the property owners in any manner, shape or form.

Objection overruled; defendants allowed an exception.

A. Yes, I remember of the city moving a light that a member of the council had placed a few

(Testimony of George Dooley.)

feet further north to a point opposite Burkhart Alley.

Q. What was the purpose of moving that light from its original location?

Mr. GRAHAM.—I object to that as incompetent, irrelevant and immaterial. [95—56] I don't think the witness is competent to testify.

Objection overruled; defendants allowed an exception.

A. The light was placed there to light the passageway between the Burkhart Alley.

Q. That light you have just testified to was a street lamp-post, was it? A. Yes, sir, it was.

Q. And it had formerly been placed how far north of the place where it was moved to, about, approximately?

A. About fifty feet, I should judge.

Q. Do you recall at this time, any time, during the time you occupied the position of chief of police in the town of Cordova, of notifying the property owners, whose property abutted on each side of the Burkhart Alley to make repairs of their sidewalks, and in so doing were you following the instructions given you by the City Council?

A. On one occasion the council notified me to notify Mr. Burkhart that his sidewalk in front of the tailor-shop on Second Avenue sloped too much toward the street and told me to tell him to raise it.

Q. That was the sidewalk along Second Avenue?

(Testimony of George Dooley.)

A. Yes; and on another occasion I was notified to notify the owners to repair the walk in the passageway between Lots 7 and 8.

Mr. GRAHAM.—We move to strike that answer on the ground that it is incompetent, irrelevant and immaterial.

Motion denied; defendants allowed an exception to the ruling.

Q. That is the Burkhart Alley that passes over Lots 7 and 8? A. Yes, sir.

Q. Did you while chief of police ever cause the snow to be shoveled out of Burkhart Alley?

A. I did. [96—57]

Q. Just how often, would you say, you did that, during each winter, while you were chief of police?

A. Three or four times; I couldn't say exactly; sometimes Mr. Burkhart would do it and other times I would go by with a crew of men which I used to employ on these occasions and it was cheaper for him he said to have the crew and have me do it, and on one occasion I think he was out and I sent the crew down there and cleared out a passageway down in the alley.

Q. That was the same as you cleaned out the other streets of the town where the accumulation was heavy and needed cleaning out?

A. Yes, that was after I served a notice of 24 hours on the owners; I would clean off the walks under the direction of the Common Council and turned in the time to the City Clerk.

Q. During the time you were chief of police in

(Testimony of George Dooley.)

the town of Cordova, do you recall ever notifying the owners of Lots 7 and 8 and Lots 25 and 26, Block 7, to keep obstructions out *the* the Burkhart alleyway?

A. As chief of the fire department and as chief of police, I made it a point to always keep that passageway clear and notified the owners that I didn't want any obstructions in that alleyway in case of fire, as I wished to go through there with the apparatus.

Q. You used the Burkhart alley during that time when occasions required to pass through with the fire apparatus? A. I did.

Q. Were you in the town of Cordova this last summer when a fire occurred in the Burkhart apartments on Lot 25, Block 7?

A. I was in town but at home quarantined with the smallpox at that time.

Mr. DONOHOE.—That is all. [97—58]

Cross-examination.

(By Mr. GRAHAM.)

Q. During all the time that you used this alley, went through it, etc., you could plainly see that the buildings were so constructed that the overhead part of the two buildings on either side of Burkhart Alley on Lots 7 and 8 in Block 7 occupied the entire space over the alley, couldn't you?

A. That they were connected—yes, sir.

Q. And when you went through there there was no snow ever accumulated in that portion?

(Testimony of George Dooley.)

A. No, sir, except at the rear in the alley or in the front, on the sidewalk.

Q. Brought in or dragged in by people traveling back and forth in there but no great accumulation of any quantity of snow?

A. Not in the alley itself,—at the extreme end.

Q. Where the other alley crosses it?

A. Yes, sir.

Q. There would be some snow from the other alley? A. Yes, sir.

Q. And this so-called Burkhart Alley or hallway through that building was practically enclosed?

A. Enclosed overhead.

Q. On both sides?

A. I wouldn't call it enclosed on both sides; during all of this period there was about 60 feet of show-window that ran on the lot.

Q. That was an enclosure?

A. Yes; that was an enclosure.

Q. And that entirely protected it from the storms and elements and wind? A. Yes, sir.

Q. It was just like passing through a building to go from Second to [98—59] First Avenue through that building to the alley behind it, the regular alley?

A. Well, there was a passageway—I wouldn't call it passing through a building.

Q. There was a building over your head and on both sides and still you are not passing through a building? A. I wouldn't call it a building.

Q. What would you call it? A. A passageway.

(Testimony of George Dooley.)

Q. Through what? A. Under the buildings.

Q. You don't go down under the floors of the buildings? A. No.

Q. A passageway through the buildings on the street level? A. Yes, sir.

Q. In case of a fire to property right around in that immediate vicinity you wouldn't expect the property owners to object to your going through there to protect this property and other property adjoining it? A. No, sir.

Q. And you would naturally expect, regardless of whether it was a public passageway or a private way, you would naturally expect for mutual protection and benefit to the property itself that the people would permit the use of the fire department, going through that alley?

A. Yes, I would expect they would.

Q. And it was to their interest to keep it open for that purpose, to let the fire department use it, whenever there was occasion to take it through there? A. I believe it would be; yes, sir.

Q. The only purpose for which you could take fire equipment through [99—60] that place would be for the protection of the property immediately adjacent thereto, would it not?

A. Well, yes, I would say it would be handy for that.

Q. It is all built up continuously from these buildings north of C Street? A. Yes, sir.

Q. And is built up solidly from the buildings south to B Street? A. Yes, sir.

(Testimony of George Dooley.)

Q. So that if there was a fire anywhere in that block it would be a matter of considerable concern to the property owners on either side of that so-called alley? A. Yes, sir, it would.

Q. Will you please state the name of the owner of Lot 7 in Block 7 whom you notified to clear the alley of obstructions?

A. Not of obstructions—I think it was to repair the walk I testified about.

Q. You testified you notified the property owners to keep that clear so you could get through if there was a fire?

A. I notified, on one occasion, Mr. Harwood. There was some beer kegs in the alley. I notified Mr. Reedy to repair the walks and notified Mr. Burkhart.

Q. When was it you notified Mr. Harwood?

A. I couldn't recall the date. It was in 1910, I think.

Q. Summer-time or winter-time?

A. I think it was in the fall. I returned in September of that year from the states and I think it was after I returned.

Q. Who was present when you notified him?

A. I don't know that anybody was present. I told him to take up the obstruction there in case of a fire and he immediately had his porter put them in the basement.

Q. Did you tell him you ordered him to do that as chief of police? [100—61]

A. I didn't really order him. I called his atten-

(Testimony of George Dooley.)

tion to it and told him the passageway should be kept free, always had been.

Q. And he was very willing to keep it open?

A. Yes, sir.

Q. And moved kegs? A. Yes, sir.

Q. You didn't tell him by authority of the city or by authority of your being chief of police you ordered him to do that?

A. I told him just what was to be done. I didn't notify him that I was chief of police and chief of the fire department; he knew that, and was working in perfect accord on things of that nature and did it willingly.

Q. And would have done it whether it was a public alley or private alley?

A. I presume he would.

Q. You would simply expect him to do that as a matter of public protection?

A. As a good citizen—to protect the rights of others and his own, he would do it, without any ordering that it be done.

Q. What about this repairing of sidewalks that you said you ordered some one to do—who did you order to repair sidewalks?

A. I had that conversation with Mr. Reedy.

Q. Who was Mr. Reedy?

A. At that time he was a partner in the firm of Slater, Reidy & O'Neill in the grocery-store now occupied by the Northern Drug-store.

Q. He was a partner in a grocery concern that occupied one of these buildings?

(Testimony of George Dooley.)

A. Yes, sir. They used to truck a great deal of their merchandise from what is now the old jail, the marshal's office, down through there and several boards at the intersection of the [101—62] alley and Burkhart Alley became damaged and I called his attention to it—that there was a couple of boards broken.

Q. They were in the main alley, were they, not the regular alley—between the portion of Burkhart Alley that goes in the passageway and the other portion? A. Yes, they were in the main alley.

Q. And that was a part of the planking in the public alley that runs north and south?

A. No, it was a part of the planking in this passageway that runs east and west.

Q. In this building? A. Under this building.

Q. When did you notify Mr. Reidy of that?

A. Shortly after I discovered it.

Q. How much of a hole was there there?

A. A couple of boards were cracked and I took it he would be glad to be notified of those things, someone might step in and turn an ankle.

Q. If he was the owner of that passageway through there and permitted people to go through, you thought he would like to be notified if there were any defects in the walk?

A. I knew he and his employees had broken them with the truck and merchandise.

Q. The reason you notified him was because you thought he would like to have the matter brought to his attention? A. And public safety.

(Testimony of George Dooley.)

Q. Safety of everybody, whether it was public or private? A. Yes, sir.

Q. You did that wherever you found defects in sidewalks? A. Yes, sir, any place.

Q. Did you tell them that under your authority as a representative [102—63] of the city you required him to fix that?

A. I didn't tell him that; he knew I was such officer and I didn't tell him under authority of that kind.

Q. What did you say to him?

A. I couldn't recall the exact words I said at this time. I possibly told him the walk needed repairs and ought to be fixed before someone got hurt.

Q. That is about what you would say to him.

A. Yes, that is about what I would say to him in a case of that kind.

Q. In other words, you told him the walk needed repairs and he had better repair it before someone got hurt?

A. Something of that kind. I don't recall the exact words now.

Q. There were other lights in this passageway that extends through these two buildings called Burkhart Alley, besides the city light you spoke of, was there not? A. None I recall.

Q. Is it not a fact that there were one or two or two or three other lights in that passageway that were some distance from the street?

A. I don't recall any.

Q. Never saw any? A. None I remember.

(Testimony of George Dooley.)

Q. You won't say there were no other lights in there?

A. I wouldn't say there was not; no. I will say that the passageway, while occupied by the Lindig restaurant and by Harwood along that 60 ft., along the north side, of the passageway, up to a reasonable hour in the evening, the passageway was lit up by the lights in the different business houses in the alley. I don't know of any light but the one during the darker hours. [103—64]

Q. You wouldn't say there wasn't any?

A. No, I wouldn't say there wasn't any.

Q. There was a cellar under the floor of this passageway?

A. There was an entrance to cellars in this passageway, yes; one went into Ashland's saloon and one went under the Horseshoe, and if I am not mistaken there was another one, a little further back, under where Harwood and Lindig was.

Q. Those were in the floor of the passageway?

A. Yes; shoots going into the floor of the passageway.

Q. And in the building on Lot 8, Block 7, the one on the southerly side of this so-called alley, there was a door which swung out into the alley, was there not?

A. That is the building now occupied by the Bank of Alaska. I have forgotten which way the lots run—which is the Horseshoe, Lot 7 or 8.

Q. That is 8—I asked you about the one where the Bank of Alaska is now?

(Testimony of George Dooley.)

A. Yes, there were two passageways there, two entrances.

Q. At one of those, the door when opened, would have extended out into the alley?

A. Yes, the one going upstairs to the halls, above the bank, swings out.

Q. Now, this business of handling the snow in the alley there, in reference to the Burkhart flats that you spoke to Mr. Burkhart about—was with reference to the apartments, the flats? A. Yes, sir.

Q. He said he would be glad to have you do it, as to do it himself, it was cheaper? A. Yes, sir.

Q. And it was an accommodation for him in that respect, when you were there with your crew, to shovel the snow out? [104—65] A. Yes, sir.

Q. The same as you would at any other place where you had occasion to shovel snow from the sidewalks? A. The same thing.

Q. That was by some arrangement you had with Burkhart?

A. That was on one occasion, yes, sir—he had me do that.

Q. He told you to go ahead and do it and he would reimburse you for your time?? A. Yes, sir.

Q. That had nothing to do with Block 7 and 8?
A. No.

Q. How did the appearance of this alley, so-called Burkhart Alley, when you make your entrance from First Street, compare with the appearance of other alleys in the city, public alleys—the same or was it different?

(Testimony of George Dooley.)

A. Of course, the alley as it appears now is changed. At one time the Horseshoe entrance used to be right on that corner, that would be on the northerly side of the building on Lot 8, the bank building, swinging doors on the corner, that came right out, half in the alley and half possibly out on to Front Street. Your question was, how does that compare with other public alleys?

Q. Yes. What is the appearance of it with reference to other public alleys?

A. I would say that this alley was boarded in the bottom and kept cleaner than most of our public alleys.

Q. It was a regular floor, the whole width of the alley? A. Yes, sir.

Q. And the floor extended out from one end of the building to the other end of the building?

A. Yes, sir. [105—66]

Q. All walled up on both sides?

A. At times it was walled and other times it was not; glass fronts in some of it there.

Q. There were parts of the buildings extended overhead clear to the center of the so-called alley?

A. I think they do; yes.

Q. You know it?

A. I don't know whether they infringe on one another or not. I say they joined.

Q. To the approximate center?

A. I would say so; yes.

Q. And are there any public alleys in the town of Cordova where the private buildings extend clear

(Testimony of George Dooley.)

over to about the center of the alley and join over the alley?

A. No; I don't know of any other public alley.

Q. It don't look just like a public alley, then, or any other alley?

A. No, it is not like our regular alleys; no.

Q. Is it like any other alley in the city?

A. Well, they use the alleys for passageways here, too.

Q. You can answer my question: Is it in appearance like other alleys in the city or any other alley?

A. Well, I wouldn't say that it was; no.

Q. Is there any other alley in the town of Cordova that is entirely floored over?

A. None I know of.

Q. Is there any other alley in the town of Cordova where the buildings on either side project entirely over the alley and come together over it, so you go in under the buildings or through the buildings?

A. No, sir, none I know of. [106—67]

Q. Now, in what respects did it resemble the other alleys in the city or public alleys in the city?

A. Well, I don't know; I never termed it an alley except in name.

Q. What I am asking is, how did it resemble an alley?

A. I don't think it bears any resemblance to an alley.

Q. You don't think it does? A. No, I do not.

Q. It is in the same condition substantially now that it was nine or ten years ago?

(Testimony of George Dooley.)

A. Practically the same.

Q. As far as appearances are concerned?

Q. So it looks to you?

A. Yes; I would say there were a few little minor changes, boarding up windows and little changes of things there.

Mr. GRAHAM.—That's all.

(By Mr. DONOHOE.)

Q. Mr. Dooley, by what name is this passageway called, been generally called, since it was opened up?

A. I have heard it called by two names—the Burkhart Lane and Burkhart Alley.

Q. You spoke of notifying Mr. Harwood to remove some obstructions—at that time was Harwood the lessee and in possession of the building, the building on Lot 8, which faced on First Avenue?

A. He was.

Q. He was then conducting the Horseshoe Saloon in that building? A. Yes, sir; he was.

Q. You said something about cellars being under a portion of this alleyway—I will ask you if there were trap-doors or doors in the [107—68] floor of the alleyway—if that was the means of reaching these cellars?

A. It was; there were trap-doors and shoots into it.

Q. Are those the same kind of doors used in the sidewalks or streets of Cordova where people have shoots leading down to the basements in the sidewalks? A. Of a similar nature; yes.

Q. And when the doors were closed, they became

(Testimony of George Dooley.)

a part of the floor of the alleyway? A. They did.

Q. I forgot to ask you—what business are you in at this time? A. Hotel business.

Q. How long have you been engaged in the hotel business, in your present hotel business?

A. About two years.

Q. Where is your business situated?

A. The Cordova House.

Q. On First Avenue?

A. On First Avenue, yes, sir.

Q. Have you for the past three or four years had occasion to rent apartments or small houses in the town of Cordova? A. I have.

Q. Where are these houses situated?

A. I have sixteen on Second Avenue here, acrossed to A Street, 16 small cabins, apartments, I am looking after, just in the rear of the Modern Laundry, known as the Hall property.

Q. You are familiar with the rents that small apartments or cabins can rent for on Second Avenue and vicinity in the town of Cordova?

A. Yes, what I am looking after; I am pretty well conversant with it. [108—69]

Q. Are you somewhat familiar with the apartments in the building on Lot 25 in the town of Cordova? A. Yes, sir.

Q. I will ask you what, in your opinion, would be the decrease, if any, in the rental values of the apartments in the building on Lot 25 in Block 7 should the westerly end of Burkhart Alley be closed so that the public could not use it for a public thoroughfare?

(Testimony of George Dooley.)

Mr. MEDLEY.—I object to the question. It has no bearing on the point in issue in this case, whether the alley is a public alley or not; it is irrelevant.

Mr. DONOHUE.—It is not asked for that purpose, but to show special damages.

The objection was by the Court overruled; to which ruling the defendants are allowed an exception.

A. I would say that the decrease in the rentals would be very material—about how much I couldn't exactly say.

Q. Have you under your charge and control other small houses between First and Second Streets that you have been renting? A. I have.

Q. Up until a short time ago what entrance did you have for those houses?

Mr. GRAHAM.—They are not on this lot, are they?

Mr. DONOHUE.—No, they are not on this lot.

Mr. GRAHAM.—We object to the question as incompetent, irrelevant and immaterial, and argumentative.

Mr. DONOHUE.—The object of the testimony is to show the basis on which he bases his opinion that this property would be materially decreased, the rental value, by the closing of the alley.

Objection overruled; defendants allowed an exception.

A. The entrance along or off of Second Avenue leading along the [109—70] stairway up to the street and entrance in the regular alley between

(Testimony of George Dooley.)

First and Second and the one most used was through the property of Joe Hall out to First Avenue.

Q. Then these buildings up to recently had an entrance way from First Avenue to the building?

A. Yes.

Q. And has that entrance from First Avenue been recently closed? A. Yes, sir.

Q. What effect did it have upon the rental value of these buildings? A. I lost two tenants.

Q. Where is the main business portion of the town of Cordova? A. First Avenue.

Q. Now, you stated that in your opinion the rental value of these apartments of the building on Lot 25, Block 7, would be materially decreased if the western end of Burkhart Alley was closed—will you state to the Court any reasons that convince you that the rental value of these apartments would be decreased?

A. If that entrance is closed people renting houses or apartments of that nature would rent any place else in preference to going there, or move, because they would have to make a detour around B Street or C Street to get to First Avenue and they would naturally rent places closer to the business section of the town.

Q. As the situation is now, with the Burkhart Alley open to First Avenue, it makes the apartments convenient to the business section of the town? A. I would say it did; yes, sir.

Mr. DONOHUE.—That is all. [110—71]

(Testimony of George Dooley.)

(By the COURT.)

Q. You have testified that you knew no other alley in the town that appeared similar to this alley; do you know of any other place in the town where property owners in the middle of a block, in constructing their buildings, have left a space that would make an alley such as this? A. I do not.

Q. In passing through this alley for the several years which you have testified that you have passed through it, in your capacity as chief of police and chief of the fire department or as a private individual, have you seen in the alley and on the sides thereof, or at any of the corners at the entrance to the alley from either First or Second Street, any signs or notices designating it either as a public or as a private thoroughfare?

A. The only sign of that nature I ever remember seeing there was recently, during the period of the fencing in, on the drug-store side.

Q. I had reference to prior to that?

A. No, sir; none whatever.

Q. Neither public nor private?

A. Never, nothing of that kind.

Witness excused. [111—72]

Testimony of Ed L. Harwood, for Plaintiffs.

ED L. HARWOOD, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHUE.)

Q. What is your name and place of residence?

(Testimony of Ed. L. Harwood.)

A. Ed L. Harwood; Cordova.

Q. How long have you resided in Cordova?

A. About eleven years.

Q. What is your business or occupation?

A. Billiard-hall, cigar-stand.

Q. *What* is that situated? A. In Block 7.

Q. How far is it from Burkhart Alley?

A. Twenty-five feet—twenty feet rather.

Q. You have lived here continuously since 1908?

A. I have.

Q. Were you at one time the lessee of the building on Lot 8 in Block 7 owned by Mr. Burkhart?

A. Yes, sir.

Q. How long were you lessee of that building?

A. About ten years.

Q. And you conducted in that what was known as the Horseshoe Saloon? A. Yes, sir.

Q. That building lies along the southerly side of Burkhart Alley? A. Yes, sir.

Q. And faces out on First Avenue?

A. Yes, sir.

Q. Do you know when Burkhart Alley was opened up and the public commenced to travel through it?

A. I think it was in the fall of 1908.

Q. Do you know to what extent Burkhart Alley was used by the traveling [112—73] public going between First and Second Streets in the town of Cordova since it was opened up in the fall of 1908?

A. At the time the postoffice was on Second Street

(Testimony of Ed L. Harwood.)

it was used about the same as First Avenue was—at that time.

Q. Used as much as First Avenue?

A. Yes, sir.

Q. Since the postoffice was moved about a year ago on to First Street, what would you say as to the use of the alley?

A. It wasn't used so much as it was before.

Q. Would you say that it was used by any number of people who had business up on Second Street?

A. I should judge it was used; I know I used it—any time I wanted to go out I always used it.

Q. You used it going home? A. Yes, sir.

Q. Where is your home?

A. C Street, corner Third.

Q. And you have used the alleyway in going to and from your residence? A. Always.

Q. Have you since you built your residence—you have used it ever since you built your residence on the corner of C and Third? A. Yes, sir.

Q. Did anyone at any time ever offer any objections or make any objections to your using that alley? A. They did not.

Q. Did you ask permission from anyone to use the alley? A. No, sir.

Q. What can you say as to whether or not Burkhardt Alley has been continuously used by the traveling public of the town of Cordova [113—74] since the fall of 1908?

A. I don't see any difference from their using

(Testimony of Ed L. Harwood.)

any public thoroughfare, First or Second or any other street in the city.

Mr. GRAHAM.—We move to strike the answer as not responsive.

Motion denied; defendants allowed an exception to the ruling.

Q. Mr. Harwood, when you were entering into your lease with Mr. Burkhart for the building on Lot 8 in Block 7 of the town of Cordova, did you have any discussion with Mr. Burkhart about what is known as Burkhart Alley?

Mr. GRAHAM.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—Your contention is that the discussion of the predecessor in interest would bind the present owners?

Mr. DONOHOE.—Yes, sir. We claim there was an actual dedication, if not an actual dedication, there was a common-law dedication or a dedication as established by prescription. If we can establish an actual dedication statements made by him during the time he was the owner of the property in question would tend to establish an actual dedication. An actual dedication would become a public street immediately upon the dedication; a common-law dedication, of course, has to be a number of years of uninterrupted use.

Mr. MEDLEY.—Mr. Burkhart is not the predecessor in interest of Mr. Slater. Even though it was admitted as against the Bank of Alaska, it could not be admitted as against Mr. Slater.

(Testimony of Ed L. Harwood.)

The COURT.—It may be admitted for that limited purpose, as to the Bank of Alaska.

To which ruling of the Court defendants are allowed an exception.

Q. Answer that question, yes or no?

A. Yes, I did.

Q. Just state what statements were made by Mr. Burkhart in reference [114—75] to the Burkhart Alley at that time?

Mr. GRAHAM.—We object as incompetent, irrelevant and immaterial.

The COURT.—The objection will be overruled and exception allowed. It will be admitted for the limited purpose indicated.

A. The principal reason I rented or leased the building was on account of the alley and it was understood—

Mr. GRAHAM.—We object to that.

Q. State what Mr. Burkhart said to you.

A. He told me that he and Bob Ashland had agreed to keep that open and that they entered into an agreement to donate four feet all the way through on the alley.

Mr. GRAHAM.—We move to strike the answer as being hearsay; if the declaration could be allowed at all, it would be public reference—it is not reference of some one individual; it would have to partake of a public nature.

The COURT.—It will be considered for the limited purpose stated, and the motion to strike will be denied and exception allowed.

(Testimony of Ed L. Harwood.)

Q. He said they each had donated four feet for the alley? A. Yes, sir.

Q. The alley at that time was being used by the traveling public? A. It was.

Q. Now, during your occupancy of the Horseshoe Saloon, which lies along the southerly side of the Burkhart Alley, did you have occasion to take up the question of keeping the alley clear from obstructions with Mr. Bob Ashland, the then owner of Lot 7, Block 7? A. I did.

Q. State what was done in that respect and what was said by you to Mr. Ashland and by Mr. Ashland to you.

A. I told Mr. Ashland that I was the lessee of the property and [115—76] unless he kept his side clean, kept obstructions out of the alley, that I would have to board up our half of it, at that time.

Q. What obstructions did Ashland have in the alley at that time?

A. He had lumber, beer kegs and whiskey barrels and one thing and another.

Q. What did he do after you demanded of him not to obstruct the alley?

A. He cleaned it up and always kept it clean after that.

Q. He always kept it clean after that?

A. Yes.

Mr. DONOHOE.—That is all.

(Testimony of Ed L. Harwood.)

Cross-examination.

(By Mr. MEDLEY.)

Q. Mr. Harwood, what time did you start your poolroom at your present place?

A. 1909; I think it was in July we opened up the billiard-hall.

Q. After you had rented the room and building from Ashland?

A. Yes, a year after—not a year but close on to a year; about nine months, I think.

Q. Did you use the basement of that buliding at all? A. The basement of the bank building?

Q. Yes.

A. Yes, my storeroom was there, altogether.

Q. Did part of it extend underneath the alley-way?

A. No, it did not; only the door or stairway.

Q. You had a chute running down?

A. Yes, a stairway running down.

Q. Did you have a light in the alleyway that you paid for?

A. Yes, we paid for the light there—I paid for one light propably [116—77] four or five years.

Q. Were there other lights in the alley that were paid for by private persons instead of by the city?

A. At the time that Reidy & MacDonald were at that place they had lights put in there and Burkhart himself had a restaurant in the back end of this building, a cafe-house, that was lit up, that had plate-glass windows, a glass front, and on the other side, after Burkhart put up the next building and

(Testimony of Ed. L. Harwood.)

started his restaurant there, he had a big globe out in the alley. He didn't have the building that is there now; he had a little place at that time, used for a little coffee-house, where the Herald Building is now.

Q. How many lights would you say there have been in the alley that were paid for by private persons?

A. When Lindig was there he had a sign out. He had a light in front of his place and there was one at the end of the alley, next to the alley, the main alley, and one on the front.

Q. Did the city ever pay for those lights while you had a store on the alley?

A. The last three or four years I paid for no lights there at all and I don't know whether the city paid for them or who paid for them.

Q. Up to that time you had paid for them?

A. I paid for one light there. We had an understanding, when O'Neil & Slater took the grocery-store there, that they would pay for one end and I paid for the other.

Q. The lights in the alley?

A. I think that was the arrangement at that time.

Q. What time was that?

A. Probably three years ago, I think, or four years ago—I don't remember just what year it was.
[117—78]

Q. All the time that you have been in Cordova, the general physical arrangement of the alley was the same as it is at present?

A. Yes, the same, only it has been boarded up.

(Testimony of Ed L. Harwood.)

They had changed the entrances two or three times. They used to have corner entrances there, both the entrance to the saloon and also the entrance to the drugstore—that was changed at one time.

Q. But the buildngs on Lot 7 and 8 have always covered over, made a roof to the alley?

A. Yes, sir.

Q. And anybody coming into that alley or wishing to use it, could see it was so covered?

A. Yes, they certainly could.

Q. You wouldn't say, Mr. Harwood, that that alley was like any other street or highway, being covered like that, and people living over it—people did live over it at one time? A. Yes, sir.

Q. They have, pretty near continuously, ever since the buildings were erected? A. Yes, sir.

Mr. MEDLEY.—That's all.

(By Mr. DONOHUE.)

Q. You spoke of some plate glass put in along the northerly side of the Burkhart Alley, in the building on Lot 7, Block 7, which is now the Slater Building. What was that plate glass put into the building for?

A. In order to show the goods up—they used it for a front.

Q. Display windows?

A. Just the same as the front would be. [118—79]

Q. Could the displays in this plate-glass window be observed from the sidewalk along First Street or would only people traveling through the alley see the display?

(Testimony of Ed L. Harwood.)

A. You would have to walk back in order to see it, I suppose.

Q. It was like a display window along the front of the store, in a street, or on a sidewalk?

A. Yes, sir.

Q. You spoke of someone having a globe out in front of the restaurant and a sign out. Was that sign in position to attract the attention of the people traveling along the sidewalk on First Street and of the people traveling through Burkhart Alley?

A. I think it would attract them from First Avenue and Second Avenue, and they could see the restaurant by going through the alley.

Q. Where was the sign, how far back from First Avenue? A. About halfway.

Q. That would be about 50 feet from the front of the building?

A. Yes, about 50 feet from the front of the building.

Q. It was a display sign that a man would ordinarily put out in front of his business for people traveling along the sidewalk? A. Yes, sir.

Q. Mr. Medley has asked you a question, something about the basement or cellar and the entrances to them—were there trap-doors from those entrances? A. Yes, sir.

Q. The same as is ordinarily used in the sidewalk where they have an entrance to the basement from the sidewalk? A. Yes, sir; just the same.

Q. And when they closed the door, would con-

(Testimony of Ed L. Harwood.)

stitute a part of the floor of the walk?

A. Yes, sir. [119—80]

Q. You were asked if this alley in any manner resembled other alleys or streets in the town. I will ask you if the travel through and over this Burkhart Alley was any different from what it was along the ordinary sidewalks of the town of Cordova?

A. Just in this way—that I have never seen any thoroughfare or alley that was boarded over.

Q. That was the only difference—the top?

A. Yes, sir.

Q. But so far as the use of the walk through there, what would you say, as to its being the same as that of any other sidewalk in the town?

A. The same purpose.

(By Mr. GRAHAM.)

Q. I believe you stated on your direct examination that the amount of travel on this Burkhart Alley equaled the amount of travel on First Avenue during the time the postoffice was in the building up here on Second Avenue—during that period practically all the business houses of the town were on First Avenue? A. Yes, sir.

Q. And all the travel from one business place to the other in the town, except the postoffice, would be along First Avenue?

A. It wasn't all on First Avenue at that time.

Q. What business houses were on Second Avenue at that time? A. Blum, O'Neill Company.

(Testimony of Ed L. Harwood.)

Q. They were on the corner of Second and B Streets? A. Yes, sir.

Q. And to reach that point, the rear door of their place was on B Street, near the main alley running north and south? [120—81]

A. Yes, sir.

Q. And the front door opened out on Second Avenue, near the corner? A. Yes, sir.

Q. They had a good walk, a public street, along the side of their building and from the front of it, down to First Avenue? A. Yes.

Q. What other building was on Second Street?

A. Reidy & MacDonald, across the way, had a store there.

Q. What other buildings?

A. There was the Windsor Hotel.

Q. That is still there? A. Yes, sir.

Q. What other buildings?

A. The Ostrander Building.

Q. That is where the postoffice was—used as a postoffice and hospital? A. Not at that time.

Q. It was used as a hotel at that time?

A. Yes, sir.

Q. What other buildings on Second Street?

A. That is all—practically all the business houses.

Q. What business houses were on First Avenue at that time—who kept the store now occupied by Blum-O'Neill Company?

A. The Adams Drugstore.

Q. Who kept the store now occupied by Clayson

(Testimony of Ed L. Harwood.)

next to that? A. The Clayson clothing-store.

Q. And the next store south of there?

A. It was occupied by the White Company, from Valdez.

Q. What kind of a business was that?

A. Saloon and billiard-hall and bowling-alleys.
[121—82]

Q. And all the buildings now on that side of First Street were then occupied by businesses of various sorts? A. Yes.

Q. And the business houses on the easterly side of First Avenue and south of B Street which are now occupied for business purposes were then occupied in some manner, probably?

A. Most of them; yes.

Q. How many saloons were there in Cordova at that time? A. Twenty-two.

Q. How many on First Avenue?

A. They were all on First Avenue with the exception of one or two, I believe.

Q. Where were they?

A. There was one in the Windsor Hotel and one on the corner, this side.

Q. What street? A. On Second.

Q. In other words, there were two saloons on Second Avenue and twenty on First Avenue?

A. Yes, sir.

Q. All the travel between these saloons on First Avenue would pass along First Avenue and not through Burkhart Alley?

A. You understand there is a heavy grade going

(Testimony of Ed L. Harwood.)

up the street towards the Blum store.

Q. I am asking about the travel between the saloons on First Avenue, these twenty saloons—people passing from one saloon to another on First Avenue didn't use Burkhart Alley?

A. No, sir.

Q. So all that travel was on First Avenue?

A. Yes, sir.

Q. Now, the postoffice travel, the bulk of the travel, was through [122—83] the Burkhart Alley? A. Yes, sir.

Q. You had how many mail trains a week during that time?

A. One a week, I judge, during that time.

Q. And about once a week people went to the postoffice to get mail coming from the Copper River Valley and over the railroad line—that was about it, was it?

A. We have mail coming in from the westward.

Q. Let us dispose of the railroad first. About once a week they had occasion to go to the postoffice to get mail from the railroad?

A. I wouldn't say once a week; I generally go to the postoffice probably once a day.

Q. People had occasion to go to the postoffice about once a week to get the mail from the railway line, something like that?

A. We had trains making other trips during the week—sometimes two, sometimes one.

Q. During the greater portion of the time, how many trains a week?

(Testimony of Ed L. Harwood.)

A. Probably averaged two trains the year around.

Q. How many boats a week did you have?

A. One, sometimes two, a week.

Q. And on boat days the people would go to the postoffice and get the mail from the boats?

A. Yes, sir.

Q. And other times it was simply local mail in the town, drop letters—is that right?

A. Yes, sir.

Q. And the bulk of this travel that went through the Burkhart Alley went to and from the post-office?

A. I wouldn't say it went to and from the post-office [123—84]

Q. You didn't say that a few minutes ago?

A. I wouldn't say that it was used as much as First Avenue, but I say that alley was used publicly just the same as First or Second Avenue.

Q. Was it used half as much as First Avenue at that time?

A. I couldn't say how much it was used at that time, any more than I know it was used publicly and there was a lot of travel through that alley.

Q. You wouldn't say it was used as much as First Avenue at that time or half as much?

A. In answering the question, I was getting at the thoroughfare—that was a thoroughfare at that time and I judge as much for three or four years as First Avenue would be.

Q. That is your judgment, that there was as

(Testimony of Ed L. Harwood.)

much travel through that alley?

A. I wouldn't say there was as much but there was very nearly as much travel through that alley at that time.

Q. Where did they go to—what was the occasion to go through the alley?

A. The occasion was business, I suppose, up there.

Q. What business could they go to?

A. The business of the Blum-O'Neill Company—the biggest part of the travel—and the biggest part of the travel for the postoffice was that way.

Q. B and C Streets were both open at that time? A. Yes, sir.

Q. And had sidewalks? A. Yes, sir.

Q. It was handier for people coming from any point north of C [124—85] Street and First Avenue to go to the postoffice by using C Street, than it was to go up through the Burkhart Alley?

A. From that end, yes.

Q. People coming from down the old part of the town and going to the postoffice or to business places on Second Avenue would naturally come up Second Avenue from the old town—there is a good sidewalk up there and the shortest way?

A. Yes.

Q. There was considerable population at that time in the old town? A. Yes, sir.

Q. The population in the old town, the residence population, was greater than the population in the town of Cordova, wasn't it?

(Testimony of Ed L. Harwood.)

A. I shouldn't say so.

Q. Was it as much? A. No, sir.

Q. How did it compare?

A. There was no comparison; there were very few people in the old town.

Q. Have you any idea how many people there are in the old town now? A. Yes, sir.

Q. About how many?

A. About ten to one now to what there was at that time.

Q. What time now are you speaking of, any time during the past ten years?

A. No—the first year and a half or two years during the construction of the railroad. I am not talking of later years.

Q. That is the time you are talking about?

A. Yes, sir.

Q. The first year of the construction of the railroad—about what year was that?

A. 1909 and '10. [125—86]

Q. That is the period you say there was a great deal of travel through the Burkhart Alley?

A. Yes, sir.

Q. And that was the period they had twenty saloons on First Avenue and two on Second Avenue? A. Yes, sir.

Mr. GRAHAM.—That's all.

Witness excused. [126—87]

Testimony of H. C. Feldman, for Plaintiffs.

H. C. FELDMAN, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. H. C. Feldman.

Q. Where do you reside? A. Cordova.

Q. How long have you resided in Cordova?

A. Since November, 1907.

Q. What business are you engaged in?

A. Hardware business.

Q. You are the owner of the Northwestern Hardware Company? A. Yes, sir.

Q. Where is your business situated?

A. On First Street between C & B.

Q. Close to the Lathrop Building?

A. Yes, sir.

Q. Are you acquainted with the Lathrop Building? A. Yes, sir.

Q. You know of the stores in the Lathrop Building that are occupied? A. Yes, sir.

Q. Do you know of the apartments upstairs?

A. Yes, sir.

Q. What, in your opinion, would be the decrease in rental values to the stores and apartments in the Lathrop Building if the Burkhart Alley was closed and the crosswalk from the westerly terminal of the Burkhart Alley acrossed First Street taken out?

A. That would be hard for me to say, how much the decrease would be.

(Testimony of H. C. Feldman.)

Q. Do you think there would be a serious decrease? [127—88]

A. There would be a decrease for the stores, but for the apartments I don't think there would be any.

Q. You think it would be a serious decrease for the stores? A. Yes, sir.

Q. You are familiar with Burkhart Alley?

A. Yes, sir.

Q. Were you in Cordova in the fall of 1908 when the Burkhart Alley was laid out?

A. Yes, sir.

Q. Do you know whether the general public have traveled the Burkhart Alley since the fall of 1908? A. Yes, sir.

Q. To what extent would you say the general public have traveled Burkhart Alley from the fall of 1908 up until the fall of this year, 1919?

A. Well, since the postoffice has been moved, I guess it has been a quarter or one-fifth less traveled through there than First Street, on the sidewalk.

Q. How much?

A. One-quarter or something like that—one-quarter of the traveling on this sidewalk, on this side of First Street, on the east side of First Street.

Q. It is your opinion that since the postoffice has been moved from Second Avenue that about one-quarter or one-fifth of the general travel along the easterly side of First Street goes up Burkhart

(Testimony of H. C. Feldman.)

Alley, going from First Street to Second Street?

A. Yes, sir.

Q. Or going from Second Street down to First Street? A. Yes, sir.

Q. Can you state whether or not Burkhart Alley has been continuously [128—89] used by the traveling public since the fall of 1908?

A. Yes, it has.

Q. Did you have any conversation with Mr. Burkhart in the fall of 1908 in regard to the opening up of Burkhart Alley? A. Yes, sir.

Q. State that conversation as near as you can remember.

Mr. GRAHAM.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—The objection will be overruled; it will be admitted for the limited purpose I have indicated in the testimony of Mr. Harwood. Defendants will be allowed an exception.

A. When Mr. Burkhart started to build there he told me that he and Ashland and Finklestein had agreed to put an alley there—

Q. That he had agreed with Ashland and Finklestein to leave an alley from First Street to Second Street?

A. To make all these four corners, four corners.

Q. Did he say anything about the width of the alley?

A. I wouldn't remember that if he did.

Q. That statement was made by Mr. Burkhart at the time he was the owner or part owner of

(Testimony of H. C. Feldman.)

Lot 8 and Lot 25, Block 7? A. Yes, sir.

Mr. DONOHUE.—That's all.

Cross-examination.

(By Mr. GRAHAM.)

Q. This alley you call Burkhart Alley is a covered-over passageway through the buildings?

A. It is closed on top.

Q. How is it closed on top—what constitutes that enclosure?

A. The buildings on the two sides joining.

Q. And a portion of the two buildings over the alley are occupied [129—90] for private purposes? A. There are rooms there, I know.

Q. And they have been there ever since those buildings were constructed? A. Yes, sir.

Q. And with the possible exception of being vacant because of lack of tenants they have been occupied continuously since the buildings were erected? A. I suppose so.

Q. How does that passageway compare in appearance with public alleys in the city? How does its looks compare with the public alleys in the city, the public highways?

A. I would call it a public highway—it appears to me like a public highway.

Mr. GRAHAM.—We move to strike the answer as not responsive.

Answer stricken.

Q. Can you tell us how it compares in appearance with a public highway?

A. I don't know how to answer that question.

(Testimony of H. C. Feldman.)

Q. Does it have the same general appearance that any open public alley has?

A. It would if you simply look at it, yes—there is a thoroughfare there.

Q. You can look through a hole through the buildings, a passageway through the buildings?

A. It would all depend from where you look; if you stand right in front of it I would say anyone would consider it a public highway.

Q. Would you consider that anyone would consider it a public highway being roofed over and occupied over the top, over the alley— [130—91] people occupying it? A. Some of them would.

Q. Where have you ever seen a public highway that looked like that?

A. Not exactly that way, no.

Q. There is no such place in the town of Cordova, is there? A. No.

Q. It is all floored over, is it not—entirely floored over, the whole alley, from one end to the other of those two lots? A. Yes, sir.

Mr. GRAHAM.—That's all.

(By Mr. DONOHOE.)

Q. How does the Burkhart Alley compare with the sidewalks along the streets of the town of Cordova that foot-passengers travel?

A. You mean the looks of it?

Q. Yes; how does it compare?

A. It looks about the same.

Q. It is floored over just the same as the sidewalks—has a floor? A. Yes, sir.

(Testimony of H. C. Feldman.)

Q. And this overhead passage, the overhead joining of the buildings, does that in any way interfere with the ordinary use of the alleyway for people walking? A. No, sir.

Q. It is different from the regular alleys of the town, is it not, in that wagons and horses do not travel over this Burkhart Alley? A. Yes, sir.

(By Mr. GRAHAM.)

Q. Is it different in any other way?

A. From an alley? [131—92]

Q. Yes. A. No.

Q. How about the buildings over the top of it?

A. That would be the only difference.

Q. It is wholly enclosed except at the two ends?

A. It is only enclosed on top between the alley and First Street.

Q. That portion of it between the public alley that runs north and south and First Street is practically enclosed, with the exception of the ends of the passageway through there? A. Yes, sir; it is.

Q. Entirely closed, entirely enclosed, with the exception of the two ends? A. Yes, sir.

Q. So it is free from snow in there in the winter-time? A. Yes, sir.

Q. And protected and enclosed against the elements, wind and rain and snow, going in there?

A. To a certain extent.

Q. It is practically indoors, is it not, when you get in there?

A. If you get right in the center I suppose it would be.

(Testimony of H. C. Feldman.)

Q. The moment you step inside you are protected from any rain or snow?

A. You have to go pretty far in to be protected; drains from the roof are going right into the alley.

Q. Drains from the roof? A. Yes, sir.

Q. What roof?

A. From the roof of the Slater building.

Q. Drains where? A. Drains on to the alley.

Q. You mean there is a pipe running there? [132—93]

A. No, not a pipe; it drains from the roof, falls right on to the alley so you have to go at least five or six feet to be protected from rain.

Q. You mean over the alley where you go, there is no trough, nothing there, to prevent the rain dropping down on you from the building?

A. Yes, sir.

Witness excused. [133—94]

Testimony of E. V. Boyle, for Plaintiffs.

E. V. BOYLE, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHUE.)

Q. What is your name? A. E. V. Boyle.

Q. Where do you reside? A. Cordova.

Q. How long have you resided in Cordova?

A. About ten years.

Q. What is your business? A. Drugstore.

Q. Where is your store situated?

A. On First Avenue.

(Testimony of E. V. Boyle.)

Q. On which side of First Avenue?

A. I don't know whether it is the east side or west side.

Q. The side next to the bay? A. Yes, sir.

Q. The westerly side? A. Yes, sir.

Q. How far is it from the Lathrop Building on the westerly side of First Avenue?

A. It is probably 50 feet.

Q. In a southerly direction? A. Yes, sir.

Q. Were you living here in Cordova in 1908?

A. I was; yes.

Q. When the town was first being built?

A. Yes, sir.

Q. Are you acquainted with what is known as the Burkhart Alley? A. Yes, sir. [134—95]

Q. Were you residing in Cordova when the Burkhart Alley was opened up and first used in a public way or by the public? A. Yes, sir.

Q. Do you know whether or not since the fall of 1908 the general traveling public of the town of Cordova used Burkhart Alley whenever they had occasion to travel between First and Second Streets?

A. Yes, as far as I can remember—I don't recall any instance of when they did not.

Q. What can you say as to the extent of the travel over this Burkhart Alley since the fall of 1908?

A. Well, I have seen the alley used considerably; in fact, I have used it myself. I have seen most of the people use it from First to Second.

Q. Did you ever ask or obtain permission from

(Testimony of E. V. Boyle.)

anyone to use it? A. No.

Q. Did anyone ever try to prevent you using the alley freely as a public street? A. No, sir.

Q. You have been a member of the Common Council of the town of Cordova? A. Yes, sir.

Q. How many terms? A. I was on two years.

Q. And were you mayor for one of those years, or both?

A. I was mayor one year and acting mayor for most of the other year.

Q. During the time that you were on the Town Council of the town of Cordova, do you remember whether the municipality of Cordova furnished the lighting for Burkhart Alley?

A. When I was on the City Council we put in considerable lights, and these lights were separated, every so many feet, as agreed [135—96] upon and that would place one of them west of the Burkhart Alley on Second Avenue and in this particular instance we agreed to put it right opposite the alley.

Q. That is on Second Avenue?

A. On Second Avenue.

Q. Do you know who requested it to be put opposite the Burkhart Alley?

A. No, I do not—I think it was general discussion.

Q. During the time you were mayor or a member of the City Council do you know anything about a question coming up about the light placed by the city at the intersection of the Burkhart Alley with the regular alley running north and south?

(Testimony of E. V. Boyle.)

A. No, I do not.

Q. At one time you had a cross-walk, acrossed from the easterly side to the westerly side of First Avenue, in front of your store? A. Yes, sir.

Q. Did the City Council take any action regarding that street walk?

A. Yes, they had it removed.

Q. Why? A. They stated—

Mr. GRAHAM.—We object to the reasons.

Objection overruled; defendants allowed an exception.

WITNESS.—(Continuing.) The city objected on the grounds that if I was allowed to keep mine, everyone could place a walk opposite their place of business to the other side of the street, and for that reason it would interfere with the traffic and the looks of the street.

Q. Do you know whether or not the City Council only permitted the retaining of cross-walks at the intersection of streets?

A. In this particular case that was brought up, that sidewalks were only allowed opposite or at the intersection of streets. [136—97]

Q. Was the question at that time discussed regarding the cross-walk which joins on to the westerly terminus of Burkhart Alley?

A. I brought up the point at the time, stating that there was one allowed there and I couldn't see why I shouldn't have mine and they explained—

Mr. GRAHAM.—We object to this as incompetent, irrelevant and immaterial.

(Testimony of E. V. Boyle.)

Objection overruled; defendants allowed an exception.

Mr. MEDLEY.—I want to know with whom this conversation was held.

The COURT.—My understanding of it was, from the testimony, that the matter took place in the Council.

Q. Is that right, that this discussion was in the Council?

A. No; the discussion took place with some of the members of the council; particularly I can mention Doctor Chase. I think he was mayor of the town at the time my cross-walk was removed.

Q. Did the Town Council order you to take up your cross-walk?

A. They simply took it up; yes, sir.

Mr. GRAHAM.—We move to strike these conversations. It was no formal action of the council, but with individual members.

The COURT.—Part of the testimony is competent and part of it is not. The testimony that the cross-walk was taken out by the council would be competent, but the Court will not consider any matter that does not appear to have been the direct action of the council. I think that would cover it without going back over all the testimony.

Mr. MEDLEY.—The objection to that would be, if we have to get a record, there would be incompetent testimony in there that would prejudice the defendants. We understand it will not affect the decision of this Court.

(Testimony of E. V. Boyle.)

The COURT.—I tried to make the statement *sufficient* broad to cover it. [137—98]

Defendants allowed an exception to the ruling.

Mr. DONOHOE.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. At the time your cross-walk was taken up, there was also one opposite Clayson's?

A. Yes, sir

Q. That made three cross-walks between the regular cross-walks at B and C Streets? A. Yes, sir.

Q. So that vehicles passing along there would have to bump over three separate cross-walks in addition to the regular cross-walks? A. Yes.

Q. That is an exceptionally long block?

A. Yes, sir.

Q. It would be a matter of inconvenience to the public generally to have to go to cross-walks at either end of that block and pass acrossed the street, to go from one side of the street to the other?

A. Well, if they were forced to it would, of course.

Q. If the cross-walk was not opposite Burkhart Alley it would be a matter of general inconvenience to be required to go to the cross-walk at either end of that block? A. Undoubtedly it would.

Q. And the location of this cross-walk about mid-way between the ends of the block is a matter that serves the public generally and a matter of public convenience generally? [138—99] A. Yes, sir.

Q. So there is a walk acrossed from the Burkhart Alley? A. Yes, sir.

(Testimony of E. V. Boyle.)

Q. This Burkhardt Alley, which you say you passed through a great many times, has a good flooring in it, the entire length of the alley from First Street to the public alley on the south?

A. Yes; it is fairly well boarded.

Q. And the upper part is sealed just like the inside of the building would be?

A. Part of the alleyway is.

Q. That is that part from the public alley to First Avenue?

A. Between the bank and the drugstore.

Q. Now, the alley on either side is composed of the two buildings? A. Yes, sir.

Q. And the two buildings run over the alley?

A. Yes, sir.

Q. All that would be necessary to make a room out of that alley would be to put doors in the front and in the back?

A. Of course it takes considerably more than that to make a room out of it.

Q. To make a room out of it? A. Yes, sir.

Q. If enclosed at the front and at the back by doors at either end it would be a room?

A. Yes, sir.

Q. In the building? A. Yes, sir.

Mr. DONOHUE.—There never were any doors either at the front or back of that alley?

A. No, sir.

Witness excused. [139—100]

Testimony of H. I. O'Neill, for Plaintiffs.

H. I. O'NEILL, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination

(By Mr. DONOHOE.)

Q. What is your name? A. H. I. O'Neill.

Q. Where do you reside? A. Cordova.

Q. How long have you resided in Cordova?

A. Since November, 1908.

Q. What is your business? A. Merchant.

Q. Where is your business, your place of business? A. First Street, Cordova.

Q. You are one of the officers of the Blum-O'Neill Company? A. Yes, sir.

Q. General merchandise? A. Yes.

Q. And your store is on the corner of C and First Avenue? A. Yes, sir.

Q. Since you have been in the town of Cordova, since November, 1908, have you been engaged in the mercantile business? A. No.

Q. What were you engaged in?

A. I was a clerk for S. Blum first, up to 1912.

Q. And then did you engage for yourself in the mercantile business? A. Yes, sir.

Q. And since that time have you been in business either for yourself or with corporations in which you held considerable interest?

A. Yes, sir [140—101]

Q. In 1912 where did you commence your mercantile business?

(Testimony of H. I. O'Neill.)

A. Where the Northern Drug Company is now located, Lot 7 in Block 7.

Q. What was the firm or corporation that did business there?

A. We were operating under three names there—Reidy & Company, Reidy, Slater & O'Neill and O'Neill, Slater & Company.

Q. Reidy & Company—was that a copartnership?

A. Yes, sir.

Q. And Reidy, Slater & O'Neill was a corporation? A. Yes.

Q. And O'Neill, Slater & Company was a corporation? A. Yes, sir.

Q. How long did you do business under those three names? A. Until July 12, 1915.

Q. From 1912?

A. About February or March, 1912.

Q. Until July 12, 1915? A. Yes, sir.

Q. Now, during the time you were doing business on Lot 7, Block 7, did you own the property or did the corporation with which you were doing business ever own it? A. Yes, sir.

Q. When did you first buy an interest in Lot 7?

A. February or March, 1912.

Q. You bought that from David MacDonald?

A. Bought his interest out; yes, sir.

Q. Then you and Reidy held it as partners?

A. Yes, sir.

Q. You and Slater owned one-half and Reidy the other half? A. Yes, sir.

Q. And then later your corporation bought out

(Testimony of H. I. O'Neill.)

Reidy? A. Yes, sir. [141—102]

Q. When was that done?

A. I think it was in 1914.

Q. You are familiar with what is known as Burkhart Alley? A. Yes, sir.

Q. And you have been here and heard the witnesses testify as to where it is situated?

A. Yes, sir.

Q. Your business was being conducted along the northerly side of Burkhart Alley, at the First Street end of the alley, was it? A. Yes, sir.

Q. Did you, during the time you were in business there, have an opportunity to see whether the general public traveled this Burkhart Alley, going from First to Second and coming from Second to First?

A. Yes, sir.

Q. What would you say—was it generally traveled by people that wanted to go from one of those streets to the other? A. It was.

Q. Did you during any of the time you were owner or part owner, or a member of the corporations that did own Lot 7 in Block 7, ever at any time protest to the general public using this alley for a public thoroughfare?

A. No, sir.

Q. Did any of your partners or any members of your companies to your knowledge make any protest or objection to the general public using this alleyway as a public thoroughfare?

A. Not that I know of.

Q. On May 18, 1914, you were interested either

(Testimony of H. I. O'Neill.)

as a partner or member of the corporation that owned Lot 7, Block 7 of the town of Cordova? [142—103]

A. Yes, sir.

Q. Do you remember appearing before the City Council of the town of Cordova on May 18, 1914, and making a request of the City Council that they place some necessary lights in Burkhart Alley?

A. I remember of making that request but I don't remember the date.

Q. You remember it was some time while you were doing business on Lot 7 in Block 7?

A. Yes, sir.

Q. Do you remember what action the Council took on your request?

A. They put a light in the rear of the alley there.

Q. That is in the rear where the Burkhart Alley is intersected by the regular alley running north and south? A. Yes, sir.

Q. Do you know whether the city paid for that light? A. I presume they did.

Q. You did not? A. No, sir.

Q. Or your corporation? A. No, sir.

Q. Now, do you remember another time appearing before the Council and requesting the Council to move the lamp-post that was then placed on Second Street, about 50 feet north of the Second Street end of the Burkhart Alley, down to a point

(Testimony of H. I. O'Neill.)

immediately opposite the alley, so as to light the alley? A. Yes, sir.

Q. And did the City Council comply with your request? A. Yes, sir.

Q. This was done at the time also when you were part owner, either yourself or partner, in Lot 7, Block 7? A. Yes, sir. [143—104]

Q. Did you during the time you were doing business on Lot 7 in Block 7 have any conversation with Mr. Burkhart concerning the Burkhart Alley, in your store?

A. Not exactly conversation; just passing remarks.

Q. It wasn't a serious conversation?

A. No, sir.

Mr. DONOHUE.—That's all.

Cross-examination.

(By Mr. MEDLEY.)

Q. Mr. O'Neill, when you were in business there, either as a partner or member of the corporation and the firm you were a member of or the corporation in which you held stock was the legal owner of Lot 7, Block 7, did you and your partners consider that you owned the whole 25 feet of the lot?

A. We did.

Q. When you appeared before the City Council asking them to install a light at the point where the so-called Burkhart Alley crosses the regular public alley running north and south, was there any discussion before the Council at that time as to whether Burkhart Alley was a public alley or

(Testimony of H. I. O'Neill.)

a private alley? A. No, sir.

Q. Did you consider it a private alley at that time?

A. Running between the buildings there?

Q. Yes—the Burkhart Alley?

A. I considered it such; yes.

Q. You were a member of the Council yourself for some time? A. Yes, sir.

Q. When were you a member of the Council?

A. I believe it was in 1916. [144—105]

Q. You served a full term? A. Yes, sir.

Q. Did you attend meetings regularly?

A. Yes, sir.

Q. At any time when you were a member of the Council was there any discussion or action by the Council to the effect that the so-called Burkhart Alley was a public alley? A. No, sir.

Q. Now, the record shows that John Reidy, H. A. Slater and H. I. O'Neill conveyed to the Reidy, Slater & O'Neill Company, under date of October 3, 1913, Lot 7 in Block 7 of the Town of Cordova, as the same appears upon the official plat thereof in the Commissioner's office for the Cordova precinct. Do you remember signing such a deed? A. Yes, sir.

Q. Was it your intention to convey to the Reidy, Slater & O'Neill Company the full 25 feet of Lot 7 as it appears on the recorded plat?

A. That was my intention.

Q. There wasn't any reservation in the deed of a four-foot strip that had been used as a public

(Testimony of H. I. O'Neill.)

highway or public alley? A. No, sir.

Q. Later that same property was conveyed to Mr. Slater? A. Yes, sir.

Q. Who is the present owner? A. Yes, sir.

Q. Was conveyed by the O'Neill-Slater Company? A. Yes, sir.

Q. Did you convey to him the full 25 feet of Lot 7, Block 7 at that time? [145—106]

A. Yes, sir.

Q. The record shows that deed was dated April 15, 1917—is that right?

A. On or about that date.

Q. Did you or the firm of Reidy & Company or either of the corporations in which you were an officer, while occupying Lot 7, Block 7, pay for any lights in Burkhart Alley? A. Yes, sir.

Q. Between Lots 7 and 8? A. Yes, sir.

Q. Will you explain to the Court what lights you paid for and where they were?

A. We paid for the light right about in the middle of the alley.

Q. It was right in the middle of the alley?

A. Yes, sir.

Q. Was it placed about in the centre of the alley? A. It was both ways—the centre.

Q. Halfway between the public alley and the street and halfway between the sides, walls of the alley? A. Yes, sir.

Q. You paid for that light? A. Yes, sir.

Q. Do you know whether anyone else paid for light in the alley besides yourself?

(Testimony of H. I. O'Neill.)

A. Yes, we agreed to keep that light if Harwood would keep the front light.

Q. Where was the front light?

A. Just at the front entrance to the alley between the two buildings.

Q. Was it inside the alley? A. Yes, sir.

Q. About halfway between the side-walls of the alley, on the roof [146—107] of the alley?

A. Yes, sir.

Q. When you appeared before the Council—I don't remember the exact date but it was about the light which the Council or city put in where the main alley intersects Burkhart Alley—

A. Yes.

Q. Did you tell the Council at that time that private persons were paying for lights in the alley already?

A. That was the ground we were making the request on.

Q. You informed the Council at that time that you and Mr. Harwood were paying for lighting the alley.

A. That we were lighting our portion of the alley; yes, sir.

Mr. MEDLEY.—That will be all.

(By Mr. DONOHUE.)

Q. But you wanted the town to light a portion of the alley also? A. Yes, sir.

Q. Now, Mr. O'Neill, were you a member of the City Council in 1916?

A. Yes, sir; I believe it was 1916.

(Testimony of H. I. O'Neill.)

Q. On November 6, 1916, were you a member?

A. I am pretty positive it was 1916.

Q. It is already in evidence in this case—the following extract from the meetings of the City Council, on November 6, 1916, on page 437 of Book One of the minutes of the City Council, the following: It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired. Do you remember that transaction taking place in the Council?

A. I wouldn't say positively as to that.

Q. You were just one term on the Council?
[147—108] A. Yes, sir.

Q. You wouldn't want to be understood that during the year you were on that Council that the Council never took any action at all in regard to Burkhart Alley, as to lighting it or repairing it, or anything of that sort? A. No, sir.

Q. They may have done so? A. Yes, sir.

Q. But you at this time just don't recall it?

A. Yes, sir.

Q. In these deeds of conveyance you have testified to—your deeds do not describe the lot as 25 feet width, it simply says Lot 7, Block 7, according to the plat of the town—you didn't sell this lot by metes and bounds, in other words?

A. I don't recollect as to that—what was included in the deed.

(By Mr. MEDLEY.)

Q. When the firm or corporations in which you

(Testimony of H. I. O'Neill.)

were represented owned the building, did people live upstairs on the second floor? A. Yes, sir.

Q. Did their living-rooms extend out from the end towards Lot 8? A. Yes, sir.

Q. Out as far as it could go? A. Yes, sir.

Q. People lived there? A. Yes, sir.

Q. Continuously, while you were there?

A. Yes, sir. [148—109]

(By Mr. DONOHUE.)

Q. Where was the entrance to these upstairs?

A. It was originally inside of the building and we changed it so it would run right off from the alley, where it now is.

Q. Off to the rear end? A. Yes, sir.

Q. Off the main alley, the regular alley?

A. Off of Burkhart Alley.

Q. Originally, it was just about the centre of the building, wasn't it, or about 50 feet from First Avenue and 50 feet from the regular alley?

A. No, it was about 75 feet from the front.

Q. That entrance was off of Burkhart Alley?

A. Yes, sir.

Q. Did you during the time you were occupying and were the owner of that Lot 7 maintain a sign in Burkhart Alley, close to the regular alley, which said rooms to rent?

A. No, sir; that was put there afterwards.

Q. You have seen that there—passing through there? A. Yes.

Q. There is a sign there? A. Yes, sir.

Q. So people passing back and forth through

(Testimony of H. I. O'Neill.)

Burkhart Alley would see the sign?

A. Yes, sir.

(By Mr. MEDLEY.)

Q. The light that the city put in the alley—please describe where that light is in relation to the regular alley running north and south through the block? [149—110]

A. It is right at the edge of the building. Here is the roof of the Burkhart Alley—this was the roof of the Burkhart Alley and there is the light hanging there (indicating).

Q. Which lights up the regular alley through the block, as well as the Burkhart Alley—that is the public alley? A. Yes, sir.

(By Mr. DONOHOE.)

Q. Isn't it back about 18 inches of two feet under the cover of the Burkhart Alley?

A. It was put back far enough to keep it from getting damaged from snow falling there.

Q. The purpose of putting in the light was to light Burkhart Alley?

A. We were anxious to keep the alley lit up; yes, sir.

Q. Burkhart Alley? A. Yes, sir.

Q. You know of no other place in Cordova where the City Council has placed a light along in the middle of the block—in other words, the city has not made it a practice to place lights in its alleys, has it?

A. I don't know of any other light in an alley.

Witness excused. [150—111]

Testimony of C. H. Scheffler, for Plaintiffs.

C. H. SCHEFFLER, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. State your name and residence.

A. C. H. Scheffler; Cordova, Alaska.

Q. What official position do you hold in the town of Cordova? A. Postmaster.

Q. How long have you been postmaster?

A. Almost four years.

Q. Where did you conduct the office, when you first took over the office?

A. In the Ostrander Building.

Q. On Second Avenue?

A. On Second Avenue.

Q. How long did you conduct your office, your postoffice, at that place?

A. Up to about the 18th of December, last year.

Q. 1918? A. Yes.

Q. About a year ago? A. Yes, sir.

Q. What was your business or occupation before you became postmaster?

A. Newspaper business.

Q. When did you first commence your residence in the town of Cordova?

A. About seven years ago.

Q. About 1912? A. Yes.

Q. Where are you conducting the postoffice now?

A. On First Avenue.

(Testimony of C. H. Scheffler.)

Q. On which side of First Avenue? [151—112]

A. On the bay side of the street?

Q. Are you familiar with Burkhart Alley?

A. I am.

Q. Have you, during your residence, used Burkhart Alley for traveling back and forth from First to Second Street at various times? A. I have.

Q. Did you use it frequently or otherwise?

A. I used it frequently.

Q. And how long have you continued the use of Burkhart Alley for traveling back and forth?

A. Since I have been here, practically.

Q. Since 1912? A. Yes.

Q. Do you use it some now? A. Yes, I do.

Q. Where do you reside now?

A. On the Hill, on B Street.

Q. Near Fourth? A. Yes, sir.

Q. What would you say as to Burkhart Alley, as to the amount of travel to and from Burkhart Alley, from 1912 up to the time you removed the post-office from the Ostrander Building—the volume of travel through there?

A. I couldn't say—it was constantly used by the public.

Q. What did you say as compared with B Street or C Street, between First and Second?

A. The comparison is about the same.

Q. Do you think there was as much travel along Burkhart Alley as there was over either of the other sidewalks? A. About, yes. [152—113]

Q. What would you say as to the travel on Burk-

(Testimony of C. H. Scheffler.)

hart Alley since you moved the postoffice to First Avenue?

A. It wouldn't be the same as it was.

Q. It would not be as much, the travel through Burkhart Alley? A. No.

Q. But as compared with B and C Streets?

A. I imagine the traffic is about the same.

Q. It is your opinion that the traffic through the alley is about the same as on B and C Streets?

A. Yes.

Mr. DONOHOE.—That will be all.

Cross-examination.

(By Mr. MEDLEY.)

Q. Where did you first live when you came to Cordova? A. In the Reception Building.

Q. How long did you live there?

A. Three or four months.

Q. And then where did you move?

A. Down where the Northern Laundry is now.

Q. On Second Street? A. Yes, sir.

Q. How long did you live there?

A. About a year, I think.

Q. Then where did you move to?

A. Then we moved down to the Custom-house—where the Custom-house used to be.

Q. Where is that?

A. Where the Cable Office was.

Q. At the foot of C Street? [153—114]

A. Yes, at the foot of C Street.

Q. Did you live there long?

A. No, we lived there about six months.

(Testimony of C. H. Scheffler.)

Q. Then where did you move to?

A. Up on First Avenue, the Campbell House.

Q. Up beyond the steamship office, between C and D Streets? A. Yes, sir.

Q. How long did you live there?

A. About four or five months; I don't remember how long.

Q. Then you went into the Shushana?

A. No; I was in the Shushana when we lived at the foot of C Street.

Q. How long were you in the Shushana?

A. About two months.

Q. Where did you move to after you left the Campbell House? A. Up on the hill.

Q. And have you lived on the hill ever since?

A. Yes, sir.

Q. You have lived up on the hill ever since you have been postmaster? A. No.

Q. You moved up there before you became postmaster? A. Yes, sir.

Q. Where were you working before you became postmaster? A. In the newspaper office.

Q. Where is that located? A. On C Street.

Q. When you lived at the foot of C Street in the Customs-house, you didn't have to go through Burkhardt Alley to reach your place of business?

A. Not necessarily.

Q. It would be out of your way to do so? [154—115]

A. Yes, going to and from work.

Q. When you lived in the Campbell House, it

(Testimony of C. H. Scheffler.)

would be out of your way? A. Yes, sir.

Q. When you lived up on the hill it would be out of your way to go through the Burkhart Alley?

A. Not exactly.

Q. Why?

A. Sometimes I would go through the Burkhart Alley; I would go through the Burkhart Alley when I lived in the Campbell House as well.

Q. It would be the longest way around for you?

A. Not necessarily—we did business with the Blum Company.

Q. I said going to your place of business?

A. Yes, sir.

Q. That would be the longest way around?

A. Yes.

Q. And you wouldn't use the alley?

A. I would sometimes, in traveling around town.

Q. Just walking for exercise? A. No.

Q. Just to look around?

A. On business—I wouldn't go through just for the fun of it.

Q. When you worked in the printing office were you confined to your business pretty closely?

A. Rather; yes.

Q. How many hours a day were you there?

A. From eight to sixteen.

Q. While you were working there you wouldn't have much opportunity to observe the travel through Burkhart Alley? A. Not very much; no. [155—116]

Q. And couldn't tell just what it was?

(Testimony of C. H. Scheffler.)

A. No; I went through myself.

Q. But you wouldn't usually go through there, going to your work or coming away from your work? A. Not necessarily; no.

Q. Now, I want to get your idea when you say that the travel through Burkhart Alley was the same as the travel through or on B and C. Streets. How many people a day do you think went through there? A. I don't know; I never counted them.

Q. About how often would they go through there?

A. It depends on the business they were on.

Q. What do you base your estimate on?

A. Travel through the alleys there and the different streets and the people you meet—general traffic.

Q. You refer only to foot-passengers? A. Yes.

Q. There was no freighting or teaming through there? A. No.

Q. I can't quite see how you can testify that you used this alley continually when for the greater part of the time you lived in Cordova you were going the longest way around to go home or come to your place of business to go in there?

Mr. DONOHUE.—We object as argumentative.

Objection sustained; defendants allowed an exception.

Witness excused. [156—117]

**Testimony of A. E. Lathrop, in His Own Behalf
(Recalled).**

A. E. LATHROP, one of the plaintiffs, recalled.
(By Mr. DONOHUE.)

Q. Mr. Lathrop, since you were on the stand this

(Testimony of A. E. Lathrop.)

morning have you measured the height from the floor of Burkhart Alley as it passes over Lots 7 and 8 to the roof? A. Yes, sir.

Q. What is the distance from the floor of Burkhart Alley to the roof where it passes over these two lots? A. Twelve feet.

Whereupon court adjourned until to-morrow (Friday) morning at ten o'clock.

Friday, December 12, 1919.

MORNING SESSION.

A. E. LATHROP, continuation of direct examination.

(By Mr. DONOHOE.)

Mr. Lathrop, you are acquainted with J. E. Burkhart? A. Yes, sir.

Q. When did Mr. Burkhart move away from Cordova, about when?

A. I was over at Anchorage when he left here. I imagine it has been possibly four years.

Q. When this case was started did you make an effort to find Mr. Burkhart? A. Yes, sir.

Q. Were you able to find him? A. No, sir.

Q. What was your purpose in finding him—to have his evidence in this case? A. Yes, sir.

Q. Are you a member of the Common Council of the town of Cordova at this time?

A. Yes, sir. [157—118]

Q. How long have you held the office at this time?

A. I was elected to fill a vacancy.

Q. Were you a member of the Council in August

(Testimony of A. E. Lathrop.)

and September of this year? A. Yes, sir.

Q. Did you have a conversation with Mr. Slater, one of the defendants, in regard to Burkhart Alley just a short time before Mr. Slater erected this fence in Burkhart Alley that is described in the complaint? A. I did.

Q. Just state what Mr. Slater said to you in reference to Burkhart Alley in this conversation.

Mr. GRAHAM.—We object to that on the ground that it does not bind the defendant, Bank of Alaska.

The COURT.—The objection will be overruled; it will be received, of course, for the limited purposes heretofore stated.

A. Why, he said he was intending to close the alley, at least for a time, to establish his rights there and he had talked with the balance of the councilmen and they had no objection.

Q. No objection to his closing the alley?

A. They didn't know of any reason why. He wanted to know how I stood and I told him I seriously objected to the closing of the alley.

Q. How many members are there of your Common Council in Cordova? A. There are seven.

Q. Did Slater appear before the Council at a regular meeting of the Council, held a few days before he attempted to close the alley? A. Yes, sir.

Q. What report did he make to the Common Council that was in session at that time? [158—119]

Mr. MEDLEY.—We object to that unless it is understood that it does *that it does* not bind the defendant, the Bank of Alaska.

(Testimony of A. E. Lathrop.)

The COURT.—It is admitted as the Court has indicated for a limited purpose.

A. He said it was his intention to close the alley and he wanted to know where the councilmen stood.

Q. What did he mean by where they stood?

Mr. MEDLEY.— I object to that.

Q. State what he said?

The COURT.—You may state as near as you can what the statement was he made before the council.

A. That was about the gist of it—I don't remember the words. He wanted to appear before the council and have it, I suppose, a matter of record, that he had notified the council, that it was his intention to close the alley.

Q. Did you make any objection at that time?

A. I seriously objected.

Mr. DONOHUE.—That's all.

Cross-examination.

(By Mr. MEDLEY.)

Q. What efforts did you make to find Mr. Burkhart?

A. Why, spending good hard money in cablegrams.

Q. Did you inquire of any of his former friends in Cordova? A. I certainly did.

Q. Whom did you inquire of?

A. I don't remember now. I can tell you more about this—about three weeks later, after wiring Mr. Burkhart I received a wire from Mrs. Burkhart that he was out of the city, but giving no address. I have looked for him.

(Testimony of A. E. Lathrop.)

Q. Did you wire to Mr. Burkhart? [159—120]

A. Yes, sir, I wired to Mr. Burkhart.

Q. And that is the wire that Mrs. Burkhart replied to? A. I suppose so—it must have been.

Q. You had an address on that wire, didn't you?

A. I had an address; yes, sir.

Q. Then you must have known by receiving an answer that that wire was delivered?

A. I said about three weeks afterwards I received a wire from Mrs. Burkhart stating that Mr. Burkhart was out of the city, but gave me no address.

Q. Where did you get the address you put on that original wire?

A. I don't remember; I got it from somebody in town. I knew Mr. Burkhart was living in Seattle because I had met him there just a short time before.

Q. Do you know who Mr. Burkhart's intimate friends were in Cordova when he lived here?

A. No, I do not know that I know who Mr. Burkhart's intimate friends were.

Q. You don't know who he associated with when he was in Cordova? A. I don't remember; no.

Q. Did you inquire of Mr. Ashland where Mr. Burkhart lived? A. Mr. Ashland was not here.

Q. You knew where Mr. Ashland was, didn't you?

A. No. I did not know where Mr. Ashland was.

Q. You know he bought that property from Burkhart?

A. Yes, I know he bought that property from Burkhart.

(Testimony of A. E. Lathrop.)

Q. And if you wanted to find Mr. Burkhart, Mr. Ashland would probably be able to tell you where he was?

A. Mr. Ashland isn't in Seattle; I don't know where he is.

Q. You didn't make any effort to find Mr. Ashland? [160—121]

A. Not Mr. Ashland; no.

Q. Did you know that Mr. Burkhart was a member of any of the fraternal orders in Cordova?

A. No, sir.

Q. You didn't know that? A. No, sir.

Witness excused. [161—122]

Mr. DONOHOE.—I will now offer the deposition of David McDonald, taken in pursuance to stipulation, which I will ask Mr. Dimond to read.

Mr. DIMOND reads as follows:

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,

Defendants.

Stipulation Re Deposition of David McDonald.

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in the above-

entitled action, by and through their respective attorneys of record that the deposition of Dave McDonald, a witness on behalf of plaintiffs, may be taken upon oral, direct and cross interrogatories to be propounded to said witness at the time of taking said deposition; that said deposition may be taken before R. H. L. Noaks, a notary public in and for the Territory of Alaska, at his office in the town of Cordova, at the hour of 2 o'clock in the afternoon of the 4th day of October, 1919.

It is further stipulated that said deposition when taken and reduced to writing and certified to by said notary and filed in court may be read by either party in evidence at the trial of the above entitled cause or any retrial thereof, with the same force and effect as if said witness appeared at said trial in person and orally testified.

It is further stipulated that should the steamship "Alameda" depart from the Port of Cordova before the deposition of said witness is transcribed and the said witness has an opportunity to read and sign the same, then and in that event the signature of said witness [162—123] to said deposition is hereby waived.

It is further stipulated that each of the parties reserve all legal objection to the testimony given by said witness, save and except as to the form of the interrogatories or cross-interrogatories and may interpose any and all legal objections to said testimony at the time the same is offered in evidence, whether said objections appear from said deposition

to have been made at the time of the taking of the same or not.

It is further stipulated and agreed that all objections as to the manner of certifying said deposition and transmitting the same to the clerk of the Court are hereby waived, so long as it appears from said deposition and the certificate of the notary attached hereto that the witness was duly sworn before testifying and that the testimony contained in said deposition was given by said witness at the time and place mentioned in this stipulation.

Dated at Cordova, Alaska, this 3d day of October, 1919.

DONOHOE & DIMOND,
By T. J. DONOHOE,
Attorneys for Plaintiff.
EDWARD F. MEDLEY,
B. O. GRAHAM,
Attorneys for Defendant.

Pursuant to the herewith stipulation, there appeared before me, R. H. L. Noaks, a notary public in and for the territory of Alaska, at my office in the town of Cordova, at two o'clock in the afternoon of the 4th day of October, 1919, DAVID McDONALD, a witness on behalf of plaintiffs, also T. J. Donohoe, one of the attorneys for plaintiffs, Messrs. B. O. Graham and Edward F. Medley, attorneys for defendants, said witness being first duly sworn before me to tell the truth, the whole truth and nothing but the truth, testified, as follows: [163—124]

Deposition of David McDonald, for Plaintiffs.

(Examination by Mr. DONOHUE.)

Q. State your name.

A. David McDonald.

Q. Where do you reside?

A. Seattle, Washington, now.

Q. Did you ever reside in the town of Cordova?

A. I have.

Q. When did you first live in the town of Cordova? A. 1908.

Q. What was your business at that time?

A. Merchant.

Q. Were you associated with or in partnership with any other person? A. Yes; John Reidy.

Q. You and Mr. Reidy were running a general merchandise store under the firm name of McDonald & Reidy. A. Yes.

Q. Where was that store situated?

A. On Second Street.

Q. Was it on the premises now occupied by the U. S. Jail? A. Yes.

Q. When did you put up your building on these premises? A. In the summer of 1908.

Q. That building where you were running your store in 1908 is on the easterly side of Second Street opposite what is now known as Burkhart Alley?

A. Yes.

Q. Were you acquainted with M. Finkelstein?

A. Yes.

Q. Was Mr. Finkelstein engaged in any business in the summer and fall of 1908? [164—125]

(Deposition of David McDonald.)

A. Yes.

Q. What? A. General clothing-store.

Q. Where was his business located?

A. Second Street.

Q. Where was it in respect to Burkhart Alley?

A. Right on the alley.

Q. Was it facing abutting on Second Street on the westerly side and lying on the northerly side of Burkhart Alley? A. Yes.

Q. That is what is known as lot 26, block 7, of the town of Cordova?

A. I am not sure till I look at the plat.

Q. Did Mr. Finkelstein put up a building in the fall of 1908 on this property? A. Yes.

Q. How long did he conduct business at this point, as you remember, about?

A. I think about a year.

Q. Do you know what part of the town he moved to? A. He moved to First Avenue.

Q. Were you in the town of Cordova at the time Mr. Finkelstein put up this building in lot 26 in the town of Cordova? A. On Second Street?

Q. Yes. A. I was.

Q. Do you know, in the construction of that building, whether or not Mr. Finkelstein left a space of 4 feet along the southerly side of lot 26 in block 7, which forms a part of Burkhart Alley?

A. Yes.

Q. Are you acquainted with Robert Ashland?
[165—126]

A. Yes.

(Deposition of David McDonald.)

Q. How long have you known Robert Ashland?

A. Since 1908.

Q. Do you know whether or not in 1908 Robert Ashland was the owner of lot 7 in block 7 of the town of Cordova? A. On First Street?

Q. Yes, on First Street.

A. Yes, he was the owner of that lot.

Q. Do you know when Robert Ashland constructed a building on lot 7, block 7, of the town of Cordova?

A. In the summer and fall of 1908.

Q. Do you know whether Robert Ashland, when he constructed this building on lot 7 or block 7 of the town of Cordova, left any space along the southerly side line of said lot? A. Yes.

Q. Do you know how wide that space was?

A. Four feet.

Q. What was that 4 feet used for, if you know?

A. Used as an alleyway.

Q. Is that part of what is known as Burkhart Alley? A. Yes.

Q. Were you acquainted with A. E. Burkhart?

A. Yes.

Q. When did you first know Mr. Burkhart?

A. In 1908.

Q. Do you know if Mr. Burkhart erected a building on lot 8 of block 7 of the town of Cordova?

A. Yes.

Q. When was that building erected?

A. About the same time, as I can remember.

Q. About the same time that the Ashland building was erected? [166—127]

(Deposition of David McDonald.)

A. Yes.

Q. Do you know if Mr. Burkhart, when he erected this building on lot 8 of block 7 of the town of Cordova, whether he left a strip of ground along the northerly side of this lot that was not covered by the building? A. Yes.

Q. How wide was that strip of ground?

A. Four feet.

Q. And what was that strip used for?

A. An alleyway.

Q. Did that strip of ground, four feet wide of the northerly side of lot 8, block 7, form part of what is known as Burkhart Alley? A. Yes.

Q. Did you know of A. E. Burkhart owning lot 25 in block 7, which is the lot facing on Second Avenue along the southerly side of Burkhart Alley?

A. Yes, he owned half interest.

Q. Do you remember who owned the other half interest, in the fall of 1908?

A. A man by the name of Barber.

Q. Do you know of Burkhart and Barber putting up the building on lot 25 in block 7 of the town of Cordova? A. Joining the alleyway?

Q. Yes, on the southerly side of the alley.

A. Yes.

Q. Have you had occasion within the past week to pass through Burkhart Alley from Second Street to First Street? A. Yes.

Q. I call your attention to the building on lot 25 in block 7 [167—128] and ask you if the high walks along the northerly side of that building are now the

(Deposition of David McDonald.)

same as they were when the alley was first opened up in 1908? A. Yes, they are the same.

Q. The same porch running along the side of the building as they were when the alley was opened up in 1908? A. Yes, exactly the same.

Q. How long did you do business from summer of 1908 at your location on Second Avenue in the town of Cordova? A. Until 1910.

Q. In 1910; then where did you move your mercantile business? A. To First Avenue.

Q. What lot? A. Lot 7, block 7.

Q. In block 7? A. Lot 7, block 7.

Q. That is where the Northern Drug Company now is? A. Yes.

Q. What is now known as the Slater property?

A. Yes.

Q. How long did you do business at this new location on First Avenue, on lot 7 in block 7?

A. For two years, to 1912, in March.

Q. March, 1912. Now, you were in business from the summer of 1908 until March, 1912, in the town of Cordova, were you? A. Yes.

Q. Had you occasion to observe the amount of public travel over and through Burkhart Alley during those four years from Second Street to First Street and from First Street back to Second Street?

A. Yes.

Q. What was the relative amount of travel that passed through and [168—129] over Burkhart Alley, as compared with the travel that passed along B and C Streets between First Avenue and Second

(Deposition of David McDonald.)

Avenue, of the town of Cordova, during that period.

A. There was a greater amount of travel, at all times, through Burkhart Alley.

Q. A greater amount of travel through the alley than that of B or C Street? A. Yes.

Q. Did you in the year 1910 purchase from Ashland lot 7 in Block 7, town of Cordova?

A. Yes, where the Northern Drug Company is now.

Q. Did you, previous to purchasing this property from Ashland, have any conversation regarding the alley, and with A. E. Burkhart, regarding Burkhart Alley? A. I did; yes.

Q. This conversation was had while Ashland was still owner of lot 7 in block 7 of the town of Cordova?

A. Yes.

Q. And at the time of this conversation Burkhart was the owner of Lot 8 in Block 7 of the town of Cordova? A. Part owner.

Q. Who owned the other part? A. Barber.

Q. Now, just state that conversation that you had with Ashland and Burkhart in regard to the Burkhart Alley some time in the year of 1910 and previous to your purchase of lot 7 in block 7 from Ashland?

Mr. GRAHAM.—We object to that question on the ground that it is incompetent, irrelevant and immaterial.

Objection overruled; defendants allowed an exception. [169—130]

A. It was nothing more than that it was an advantage to the business.

Q. Was there anything said by either of these men,

(Deposition of David McDonald.)

in that conversation, as to whether the alley was a public thoroughfare and would remain open?

Mr. GRAHAM.—We make the same objection.

Mr. MEDLEY.—We object to the form of that question.

Mr. DIMOND.—The question is not answered.

Q. What, if anything, was said by Ashland or Burkhart or both of them at the time you had these conversations, as to whether Burkhart Alley was a public thoroughfare and would remain open as a public thoroughfare?

Mr. GRAHAM.—We make the same objection.

Objection overruled; defendants allowed an exception.

A. There was nothing like that.

Q. Do you remember anything else said at that time by Ashland or Burkhart regarding the Burkhart Alley? A. No.

Q. At the time you had these conversations and at the time you purchased lot 7 in block 7 was there any discussion as to the advantage of having Burkhart Alley open as a Public thoroughfare?

Mr. MEDLEY.—I object to the form of that question.

Mr. DONOHOE.—I will let the objection stand.

Objection overruled; defendants allowed an exception.

A. It was an advantage to the business to have it remain open.

Q. Did you take the fact that Burkhart Alley was open to public travel into consideration in purchasing

(Deposition of David McDonald.)

lot 7 in block 7? A. Yes.

Q. How long did you remain in business conducting a general merchandise store on lot 7 in block 7 of the town of Cordova? [170—131]

A. About two years.

Q. About two years. During that time was Burkhart Alley used as a public thoroughfare by the traveling public of Cordova? A. Yes.

Q. Did you, after purchasing lot 7 in block 7 and opening up your general merchandise store there make any change in the south wall of your building, being that wall along the northerly side of Burkhart Alley? A. Yes.

Q. What changes did you make and for what purpose?

A. We moved the door from the corner and put in thirty feet of plate glass along the alleyway.

Q. What was the purpose of putting this plate glass along the alleyway?

A. For display windows.

Q. Was there a considerable amount of travel back and forth along the alley, enough to make you put this plate glass along the alleyway? A. Yes.

Q. During the time that you were in business on lot seven in block seven in the town of Cordova did you have rooms in the upstairs of your building?

A. Yes.

Q. Where was the entrance to the upstairs to these rooms?

A. From the alleyway of Burkhart Alley.

Q. Was there any other means by which your

(Deposition of David McDonald.)

roomers could reach the rooms in the upstairs of the building except through Burkhart Alley?

A. No. They could go through the store, but then the store was locked up after six o'clock. [171—132]

Q. Now, at the time you were doing business on First Avenue on lot 7, block 7, did you have a warehouse at your old store on Second Avenue?

A. Yes.

Q. How did you travel between your store on First Avenue and your warehouse on Second Avenue?

A. Through the alley.

Q. Through Burkhart Alley. You were familiar with the situation of the building that Burkhart had on lot 8 in block 7 for the four years you lived in Cordova? A. Yes.

Q. What business was conducted in the rear portion of the Burkhart Building on lot 8 in Block 7 during the four years you were in Cordova, commencing with the fall of 1908 and extending to the spring of 1912? A. A restaurant, as I remember.

Q. Where was the entrance to this restaurant?

A. From First Avenue and from the alley.

Q. By what means did you reach the entrance from Second Avenue? A. Through Burkhart Alley.

Q. Then, as I understand, customers of this restaurant on First Avenue had to come through Burkhart Alley to the entrance to the restaurant? A. Yes.

Q. And customers from Second Avenue came through Burkhart Alley to the entrance of the restaurant? A. Yes.

Q. Were there any other entrances by which the

(Deposition of David McDonald.)

customers entered this restaurant? A. No.

Q. Did you, at any time, while you were the owner or half-owner of [172—133] lot 7 in block 7 ever claim or exercise any right of ownership over the four-foot strip off the southerly side of this lot?

A. Yes.

Q. I mean by this, the four-foot strip used as a portion of Burkhart Alley? A. Yes.

Q. In what manner?

A. We always kept it repaired for the travelers to go through.

Q. Just the same as you kept up the sidewalks?

A. Yes.

Q. That was the only actual ownership you exercised over it? A. That was all.

Q. Do you know if Burkhart as the owner of lot 8 in block 7 of the town of Cordova, during the time you lived in Cordova, ever objected to the public traveling upon and over this alley? A. No.

Mr. MEDLEY.—We object to that question.

Mr. MEDLEY.—I move the question and answer be stricken as heresay evidence.

Objection overruled and motion denied; defendants allowed an exception to the ruling.

Q. Did you during the time you were the owner of lot 7 in block 7 ever in any manner attempt to stop the public from using Burkhart Alley as a public thoroughfare? A. No.

Q. Did you ever hear of any owner of property along this alley ever attempting to stop people from using it as a public thoroughfare? A. No.

(Deposition of David McDonald.)

Mr. MEDLEY.—I object to that question as matter irrelevant and [173—134] incompetent.

Mr. MEDLEY.—I move the question and answer be stricken.

Objection overruled and motion denied; defendants allowed an exception to the ruling.

Cross-examination.

(By Mr. EDWARD F. MEDLEY.)

Q. Mr. McDonald, I understand you erected a building on Second Avenue in 1908 and moved to what is now known as the Slater building on lot 7 in block 7 in 1910, and remained there in a general merchandise business until 1912. During all those four years was the general situation as to the buildings erected on Second Avenue between B and C Streets the same as they are now? A. Yes.

Q. Was there at that time, or during those four years, any residence buildings on Second Avenue outside of what there are now between B and C Streets?

A. Just about the same, except this building here (Office of Donohoe & Dimond).

Q. You stated, that in your opinion, during the four years that you were in business in Cordova, 1908 to 1912, that there was greater traffic through the alleyway than on B or C Streets. You are familiar with what is known as B and C Streets? A. Yes.

Q. How do you account for that, Mr. McDonald?

A. Well, as far as I could see, I was positive that there was more travel in that alley than either of the other streets.

Q. Did your business keep you fairly well confined

(Deposition of David McDonald.)

on the premises where you were then located?

A. Not all the time.

Q. How many hours each day did you spend at your store? [174—135]

A. Probably seven or eight.

Q. How many hours did you spend in the vicinity of B Street? A. Very few.

Q. How many hours every day did you spend in the vicinity of C Street?

A. About the same; very few.

Q. Then your facilities for observing travel on Burkhart Alley were better than they were for B and C Streets? A. Yes.

Q. Isn't it a fact, Mr. McDonald, that the travel that you saw most in the alley was of people who lived in the alley, or in Burkhart Flats, or who had business with those in this district and with those who lived or had business with the people who roomed above your store on lot 7 in block 7? A. No.

Q. It was not; where was this travel going?

A. To the Postoffice.

Q. Where was the Postoffice?

A. Second Avenue.

Q. In what building?

A. In the Ostrander Building.

Q. Did you pay taxes on lot 7 in block 7 when you were the owner of it? A. Yes.

Q. Do you know how that lot was assessed?

A. I could not say now.

Q. Do you know whether they included that four feet or not? A. It included the four feet.

(Deposition of David McDonald.)

Q. The taxes included the four feet off the south-
erly side of lot 7? A. Yes. [175—136]

Q. You were assessed, were you not, for the full
25 feet of that lot when you were the owner of it?

A. Yes.

Q. When you purchased the lot 7 in block 7 from
Robert Ashland did you purchase the whole lot, the
full 25 feet, or was there a reservation taken off from
it for the four feet?

A. We purchased lot 7 in block 7.

Q. Who did you sell lot 7 in block 7 to?

A. To O'Neill and Slater.

Q. In the deed conveying your interest to O'Neill
and Slater, did you convey the whole of lot 7 in block
7, or did you give a reservation, excepting the four
feet off the southerly side of lot 7?

A. Conveyed the whole of lot 7.

Q. What interest in lot 7, block 7, did you convey
to O'Neill and Slater? A. Half interest.

Q. An undivided half interest? A. Yes.

Q. Now, Mr. McDonald, in the direct examination
you testified that when the building on lot 7, block 7,
was erected, they left a space four feet off the south-
erly side of said lot and when the building on lot 8
was erected, they left a space on the northerly side
of said lot 8. Isn't it a fact that no space was left
between the upper floors of these buildings?

A. Yes.

Q. That is, when those buildings were erected in
the summer and fall of 1908, the buildings on the sec-
ond floors were extended out and met on the lot lines?

(Deposition of David McDonald.)

A. Yes. [176—137]

Q. And there was no space between the buildings on lots 7 and 8 in block 7, as far as the second story or upper floors of said buildings were concerned?

A. No space.

Q. I call your attention to the sidewalk in front of Burkhart Alley on First Street. Who kept that part of the sidewalk in repairs, not the part in front of your lot, but the sidewalk in front of the alley?

A. We kept one-half and Burkhart kept his.

Q. You repaired your four foot end of it and Burkhart repaired his four feet of it. A. Yes.

Q. When you were the owner of lot 7 in block 7 did you occupy or use the upper portion of said building?

A. Yes.

Q. Did your rooms all use the whole 25 feet of the lot in width?

A. Yes, that is 24 feet, I think the building is 24 feet in width.

Q. From which side of the lot is the one-foot taken from? A. The northerly side.

Q. During the four years that you were familiar with lot 8 in block 7 Mr. Burkhart used the full width of said lot 8, as far as the upper story was concerned?

A. Yes.

Q. Within the past few days, have you had an occasion to observe the situation of the buildings on lots 7 and 8 in block 7? A. Yes.

Q. Is the situation, to-day, as to those buildings the same as it was when they were erected in 1908?

A. Yes. [177—138]

(Deposition of David McDonald.)

Redirect Examination.

(By T. J. DONOHOE.)

Q. You have answered, Mr. McDonald, that you paid taxes on the full 25 feet of lot 7 in block 7, while you were part owner of it. I will ask you if your assessment specified in feet or just said lot 7 in block 7? A. Lot 7, block 7.

Q. And there was no designated number of feet on which you were paying taxes? A. No.

Q. Do you remember what your taxes were on that lot while you were there?

A. I could not say.

Q. You sold your half interest in lot 7 to O'Neill and Slater, did you not? A. Yes.

Q. That was, as I understand you to say, in March, 1912? A. Yes.

(Signed) DAVE McDONALD.

United States of America,
Territory of Alaska,—ss.

I, R. H. L. Noaks, a notary public in and for the Territory of Alaska, do hereby certify that the witness named in the foregoing deposition, to wit, David McDonald, was by me first duly sworn to tell the truth, the whole truth and nothing but the truth, before his deposition was taken.

That said deposition was then taken at the time and place mentioned in the annexed stipulation, to wit, at my office in the town of Cordova, Territory of Alaska, on the fourth day of October, A. D. 1919, between the hours of two o'clock P. M. and four o'clock P. M. of that day. [178—139]

That said deposition was taken in shorthand by Frank Burns and reduced by him to typewriting and when completed was by me carefully read to said witness and being corrected by said witness was by him subscribed and sworn to in my office.

That the foregoing depositions contains a full, true and correct transcript of the testimony of said witness given at the time of taking said deposition.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal this 8th day of October, A. D. 1919.

[Notarial Seal]

R. H. L. NOAKS,
Notary Public in and for the Territory of Alaska.

My Commission expires on the — day of —, —.

Mr. DONOHUE.—We would like to make the request or suggestion before we rest that before the completion of the trial of this case, if your Honor is not personally familiar with the Burkhart Alley, you inspect it for your own information.

The COURT.—I have been going through there more or less since 1909 and have taken occasion to observe it very carefully the last few days, the sidewalk, openings, etc. However, I shall be glad to look at it again.

PLAINTIFFS REST. [179—140]

Mr. GRAHAM.—The defendants move that this case be dismissed on the ground that the plaintiffs have failed to establish a cause of action, in that it has not been shown that the usage by the public

was adverse or hostile to the dominion over the property by the property owners, and the testimony in the case being entirely consistent with the theory of a permissive use or a use by sufferance and allowance of the defendants and their predecessors in interest. Further, that neither the plaintiff, A. E. Lathrop, nor the plaintiff, Alice Johnson, have shown that they have been damaged in kind or character different from the damage sustained by other property owners in the vicinity or by the public in general and therefore cannot maintain an action to restrain or prohibit a public nuisance.

After argument by the respective attorneys—

By the COURT.—I rather hesitate to rule on the motion without the opportunity to give it more consideration. At the same time I realize that you ought to receive a ruling on the motion before taking further evidence, unless you are disposed not to urge a ruling on this motion at this time. The Court will consider the matter and take it under advisement, but in view of the fact that we will probably have to leave here in a few days, it seems to me that the best way will be to receive all the evidence in the case in order to expedite matters, as I cannot return here to receive further evidence. I will hear counsel on that feature of the case.

Mr. GRAHAM.—I think your Honor ought to have fully opportunity to examine the authorities, and I think, although it is a little irregular, we ought not to complain of it.

The COURT.—We will proceed, then, with the

case and the Court will [180—141] reserve its ruling on this motion.

Mr. DONOHOE.—That is satisfactory.

Mr. GRAHAM.—It is satisfactory to us. I will call Mr. Ives.

DEFENSE.

Testimony of H. A. Ives, for Defendants.

H. A. IVES, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. State your name and residence.

A. H. A. Ives; Cordova.

Q. What is your business? A. Photographer.

Q. How long have you been in the business of photography?

A. I have not been in the business steady—I started in about 1912.

Q. I call your attention to a photograph marked for identification Defendants' Exhibit One—do you recognize that photograph? A. I do.

Q. Did you take that picture? A. I did.

Q. From the negative?

A. From the negative.

Q. When?

A. On the fourth day of December.

Q. What does it represent?

A. It represents the front, the First Street entrance to the Burkhart Alley. [181—142]

Q. Showing the buildings on both sides of the

(Testimony of H. A. Ives.)

opening on the alley? A. Yes, sir.

Q. You printed these pictures yourself from the negatives? A. I did the work.

Q. There was no alteration or changes made in the negative? A. No, sir.

Mr. GRAHAM.—We offer this photograph in evidence.

Mr. DONOHUE.—We have no objection, reserving the right to cross-examine the witness regarding it.

The photograph is admitted as Defendants' Exhibit One, is attached hereto and made a part hereof.

Q. I call your attention to Defendants' Exhibit #2 for Identification. Do you recognize that picture? A. I do.

Q. Did you take that picture? A. I did.

Q. When? A. On the 4th of December.

Q. What does it represent?

A. It represents the rear entrance or rather the center of Burkhart Alley; it is taken over in front of the Burkhart Flats.

Q. It represents the rear of the buildings on Lot 7 and 8, Block 7? A. Yes, sir.

Q. Was that picture printed from the negative by yourself? A. It was.

Q. Without any change or alteration in the negative? A. Yes, sir.

Mr. GRAHAM.—We offer it in evidence.

It is admitted, without objection, marked De-

(Testimony of H. A. Ives.)

fendants' Exhibit Two, is attached hereto and made a part hereof.

Mr. GRAHAM.—That is all. [182—143]

Cross-examination.

(By Mr. DONOHOE.)

Q. Mr. Ives, what is this white streak shown in the alleyway, on Defendants' Exhibit One?

A. That is the sidewalk line from the outside of the building at the rear, showing entirely through the building.

Q. Then that white streak as shown in the alleyway extends through the Burkhart Alley from the rear end of the buildings on Lots 7 and 8?

A. Yes.

Q. From what position was that picture taken?

A. Directly in front of the building on the other sidewalk, the opposite sidewalk.

Q. The opposite sidewalk—from acrossed the street? A. Yes, sir.

Q. What time of the day was that taken?

A. It was just about 2:30 in the afternoon.

Q. It was 100 feet from the westerly end of the snow as shown on this picture, Defendants' Exhibit One—from there up to the sidewalk of First Street? A. I don't know the exact distance.

Q. This snow stops, the snow shown in the alleyway, stops at the intersection of the Burkhart Alley with the regular alley running north and south?

A. Yes.

Q. Calling your attention to Defendants' Exhibit Two, I will ask you to state if the show window

(Testimony of H. A. Ives.)

shown in this picture is the window on the west side of First Avenue? A. Yes, sir.

Q. And it is acrossed the street from the westerly terminal of Burkhart Alley? A. It is.

Witness excused. [183—144]

Mr. MEDLEY.—Defendant offers in evidence Defendants' Exhibit No. Three, a diagram which Mr. Donohoe has been given a blue-print of and which he says he will not object to, for the purpose of showing the side entrance into buildings on Lots 7 and 8 on Block 7; it was made by Mr. Hesse.

Mr. DONOHOE.—We have no objection to it being introduced for the purpose stated by counsel.

The diagram is admitted in evidence, marked Defendants' Exhibit 3; is attached hereto and made a part hereof.

Mr. MEDLEY.—I now desire to introduce in evidence certain maps—they are copies of public records certified by the custodian of the records, the United States Commissioner for this district; I introduce them under that section of the statute which makes a certified copy of a public record admissible in evidence. I first offer original plat of the town of Cordova, filed on the 22d day of May, 1908, and certified to by R. H. L. Noaks, U. S. Commissioner for this precinct.

Mr. DONOHOE.—No objection.

The plat is admitted in evidence, marked Defendants' Exhibit #4; is attached hereto and made a part hereof.

Mr. MEDLEY.—I next offer a map of Cordova,

filed for record August 31, 1911, certified by the U. S. Commissioner for this precinct; on the map is this notation: This map is amendatory of and supplemental to the original plat of the town of Cordova, recorded in the office of the Recorder for the Cordova precinct, at page 10, Book One, of Plats.

Mr. DONOHUE.—We object to the introduction of this map in evidence on the ground that while it may be of record, there is no evidence of the authority under which it was made and that it represents an actual survey. The purpose of the objection is this: The map [184—145] just admitted in evidence as Exhibit #4 was the map made of the town of Cordova in May, 1908. This present map, the one now offered, takes in a larger territory of land than that map and is a redrawing of that map. If counsel is willing to stipulate that Block 7 as shown on this map is shown as it existed in May, 1908, I have no objection to the map, but if it does not, it is a recopy of that 1908 map and not made from a survey.

The COURT.—Do you agree to the stipulation suggested?

Mr. MEDLEY.—No, we offer the map under the statute, as a certified copy of the public record.

The COURT.—What is the purpose of the offer?

Mr. MEDLEY.—It is twofold. The map purports to show on its face the streets and alleys of Cordova at the time of its being made up and a stipulation I have here and which I intend to in-

roduce has reference to that map, because it refers to deeds according to the plat of the town of Cordova, filed and recorded in Book One of Plats, at page 11, and it supplements and completes this stipulation. The description in these deeds, which it is stipulated shall be admitted, cannot be understood unless we file the map to show what it refers to.

Mr. DONOHOE.—I will state to the Court, when that first map was filed, it was filed for the purpose as shown on its face to prepare streets and alleys for dedication. When the second map was filed there was then a city government in the town, before the dedication was made by Mr. Hazelet, trustee. The intervening time, between the time of the filing of those two maps, the town had established itself as a legal entity and corporation.

The COURT.—Is there an attempt to show by this map which is now offered that on August 31, 1911, there was no opening through there? [185—146]

Mr. MEDLEY.—No, we admit that opening was there—we couldn't attempt to deny that.

The COURT.—I don't see that it makes any particular difference—it may be admitted on the statement of counsel as Defendants' Exhibit #5.

To which ruling of the Court counsel for plaintiffs is allowed an exception.

The map is admitted in evidence, marked Defendants' Exhibit No. 5; is attached hereto and made a part hereof.

Mr. MEDLEY.—I now offer this stipulation dated December 8, 1919.

The stipulation is admitted in evidence, without objection, marked Defendants' Exhibit No. 6, and reads as follows:

Defendants' Exhibit No. 6.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between plaintiffs and defendants, by Messrs. Donohoe & Dimond, attorneys for plaintiffs, and by Edward F. Medley, Esq., and B. O. Graham, Esq., attorneys for defendants, that the following described conveyances of, and instruments affecting the title to, part or all, as the case may be, of the lots in Block Seven (7) of the town of Cordova, Alaska, which are referred to in the pleadings in the above-entitled cause, were made by the respective parties hereinafter named as grantors to the respective grantees hereinafter named, on the respective dates

hereinafter specified, filed for record and recorded as and when hereinafter respectively specified and that such conveyances and other instruments [186—147] described the lot or lots in said block respectively affected thereby, in the manner hereinafter stated, to wit:

Warranty Deed, Copper River Railway Company to H. B. Burkhart, dated October 1st, 1908, filed for record December 8th, 1908, recorded in Book 2 of Deeds at page 148. Description: Lot twenty-five (25) in Block number seven (7) of the Town of Cordova, according to the plat of the Town of Cordova recorded in Book 1 at page 10.

Warranty Deed, H. B. Burkhart, to A. E. Burkhart, dated December 3d, 1908, filed for record December 8th, 1908, recorded in Book 2 of Deeds at page 150. Description: An undivided half interest in Lot twenty-five (25) in Block seven (7), as laid out and platted from United States Survey No. 449, which plat is recorded in the Cordova Recording Precinct or District.

Warranty Deed, H. B. Burkhart to A. H. Barber, dated December 3d, 1908, filed for record June 29th, 1909, recorded in Book 3 of Deeds at page 93. Description: On undivided one-half interest in lot twenty-five (25) in block seven (7) as laid out and platted from United States Survey No. 449.

Mortgage, A. H. Barber and wife to S. Blum & Company, dated December 13th, 1909, filed for record December 13th, 1909, recorded in Book 1 of Mortgages at page 178. Description: An undivided one-half interest in Lots eight (8) and

twenty-five (25) in Block number seven (7) of the Town of Cordova, according to the plat of the Town of Cordova recorded in Book 1 at page 10.

Mortgage, H. B. Burkhart to A. E. Burkhart, dated June 28th, 1910, filed for record June 28th, 1910, recorded in Book 1 of Mortgages at page 209. Description: An undivided one-half interest in Lots eight (8) and twenty-five (25) in Block number seven (7) as the same appears on the recorded official plat of said town.

Deed, Abraham H. Barber and wife to Robert Ashland, dated October 16th, 1913, filed for record May 29th, 1914, recorded in Book 2 of General Records at page 68. Description: Lots eight (8) and twenty-five (25) in Block number seven (7) in the Town of Cordova as laid out and platted from United States Survey No. 449.

Quitclaim deed, Robert Ashland to Maud Ashland, dated August 31st, 1914, filed for record September 5th, 1914, recorded in Book 2 of General Records at page 94. Description: Undivided one-half interest in Lot twenty-five (25) in Block seven (7). All these lots of the Town of Cordova, as laid out and platted from United States Survey No. 449. [187—148]

Warranty deed, H. B. Burkhart and wife to Robert Ashland, dated July 1st, 1917, filed for record August 7th, 1917, recorded in Book 3 of General Records at page 287. Description: Undivided one-half interest in lots eight (8) and twenty-five (25) in Block number seven (7), as laid out and platted from United States Survey No. 449, which

is recorded in Cordova Recording District, Alaska.

Quitclaim deed, Robert Ashland to Maud Ashland, dated January 16th, 1919, filed for record February 1st, 1919, recorded in Book 4 of General Records at page 250. Description: All interest in lot twenty-five (25) in Block number seven (7) of the Town of Cordova, Alaska, as laid out and platted from United States Survey No. 449, which plat is recorded in Cordova Recording Precinct, Territory of Alaska.

Land Contract, George C. Hazelet, Trustee, to Robert Ashland, dated June 12th, 1908, filed for record June 12th, 1908, recorded in Book 1 of Deeds at page 330. Description: Lot seven (7) in Block number seven (7), according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Warranty Deed, George C. Hazelet, Trustee, to Robert Ashland, dated June 16th, 1909, filed for record September 25th, 1909, recorded in Book 4 of Deeds at page 65. Description: Lot seven (7) in Block number seven (7), United States Survey No. 449, of records of Cordova Recording Precinct, Alaska.

Warrant Deed, Robert Ashland to Maud Ashland, dated September 16th, 1909, filed for record September 25th, 1909, recorded in Book 4 of Deeds at page 69. Description: Lot seven (7) in Block number seven (7), within the Cordova Recording Precinct and being part of the United States Survey No. 449.

Deed, Robert Ashland to Maud Ashland, dated March 4th, 1909, filed for record March 4th, 1909,

recorded in Book 3 of Deeds at page 30. Description: Lot Seven (7) of Block number seven (7) of the Townsite of Cordova.

Mortgage, Robert Ashland and wife to S. Blum & Company, dated November 1st, 1910, filed for record November 12th, 1910, recorded in Book 1 of Mortgages at page 219. Description: Lot seven (7) of Block number seven (7) and Lot nine (9) of Block number eighteen (18), according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Warrant Deed, Maud Ashland and husband to David A. McDonald and John Reidy, dated November 15th, 1910, filed for record January 2nd, 1911, recorded in Book 4 of Deeds at page 149. Description: Lot seven (7) in Block number seven (7) of the town and plat of Cordova, Alaska, and being part of the United States Survey 449.

Mortgage, David A. McDonald and John Reidy to Maud Ashland, dated December 31st, 1910, filed for record January 2nd, 1911, recorded in Book 1 of Mortgages at page 229. Description: Lot seven (7) in Block number seven (7) of the Town and plat of Cordova, Alaska, being a part of United States Survey No. 449. [188—149]

Warranty Deed, David A. McDonald to H. A. Slater and H. I. O'Neill, dated March 9th, 1913, filed for record October 3d, 1913, recorded in Book 1 of General Records at page 363. Description: Lot seven (7) in Block number seven (7), an undivided one-half interest, as shown upon the official plat

in the records thereof in the Recorder's office of the Precinct of Cordova, District of Alaska.

Land Contract, George C. Hazelet, Trustee to A. E. Burkhart, dated June 4th, 1908, filed for record June 4th, 1908, recorded in Book 1 of Deeds at page 310. Description: Lot eight (8) in Block number seven (7) as shown upon the official plat in the records thereof in the Recorder's office of the Town of Cordova, recorded in Book 1 at page 10.

Warranty Deed, George C. Hazelet, Trustee, to A. E. Burkhart, dated July 12th, 1909, filed for record September 20th, 1909, recorded in Book 4 of Deeds at page 63. Description: Lot eight (8) in Block number seven (7), according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Warranty Deed, A. E. Burkhart to A. H. Barber, dated December 3d, 1908, filed for record June 29th, 1909, recorded in Book 3 of Deeds at page 95. Description: Undivided one-half interest in Lot eight (8) in Block number seven (7), of the new Town of Cordova as laid out and platted from United States Survey No. 449, which is recorded in Cordova Recording District, Alaska.

Mortgage, A. H. Barber and wife to S. Blum & Company, dated December 13th, 1909, filed for record December 13th, 1909, recorded in Book 1 of Mortgages at page 178. Description: Undivided one-half interest in Lots eight (8) and twenty-five (25), in Block number seven (7), according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Mortgage, H. B. Burkhart and A. E. Burkhart

to S. Blum & Company, dated June 28th, 1910, filed for record June 28th, 1910, recorded in Book 1 of Mortgages at page 209. Description: Undivided one-half interest in Lots eight (8) and twenty-five (25), in Block number (7), as the same appears on the recorded official plat of said town.

Deed, Abraham H. Barber and wife to Robert Ashland, dated October 16th, 1913, filed for record May 30th, 1914, recorded in Book 2 of General Records at page 68. Description: Lot eight (8) and twenty-five (25) in Block number seven (7), in the Town of Cordova, as laid out and platted from United States Survey No. 449. [189—150]

Quitclaim Deed, Robert Ashland to Maud Ashland, dated August 31st, 1914, filed for record September 5th, 1914, recorded in Book 2 of General Records at page 94. Description: Lot eight (8) in Block number seven (7), an undivided one-half interest. All of these lots of the Town of Cordova, Territory of Alaska, as laid out and platted from the United States Survey No. 449.

Warranty Deed, H. B. Burkhart and A. E. Burkhart to Robert Ashland, dated July 1st, 1917, filed for record August 7th, 1917, recorded in Book 3 of General Records at page 287. Description: Lots eight (8) and twenty-five (25) in Block number seven (7), as laid out and platted from the United States Survey No. 449, which is recorded in Cordova Recording District, Alaska.

Warranty Deed, Robert Ashland and wife to Bank of Alaska, dated June 6th, 1917, filed for record August 2d, 1918, recorded in Book 4 of Gen-

eral Records at page 144. Description: Lot eight (8) in block number eight (8) in the townsite of Cordova.

Warranty Deed, Robert Ashland and wife to Bank of Alaska, dated September 25th, 1918, filed for record April 15th, 1919, recorded in Book 4 of General Records at page 311. Description: Lot eight (8) in Block number seven (7) according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Warranty Deed, John Reidy, H. A. Slater and H. I. O'Neill to the Reidy, Slater, O'Neill Company, Inc., dated October 3d, 1913, filed for record October 4th, 1913, recorded in Book 1 of General Records at page 365. Description: Lot seven (7) in Block number seven (7), as shown upon the official plat thereof in the Recorder's office of the Precinct of Cordova, Territory of Alaska.

Warranty Deed, O'Neill & Slater Company, a corporation, to H. A. Slater, dated April 30th, 1917, filed for record April 30th, 1917, recorded in Book 3 of General Records at page 203. Description: Lot seven (7) in Block number seven (7) according to the plat of the Town of Cordova, recorded in Book 1 at page 11.

Land Contract, George C. Hazelet to M. Finkelstein and J. Sapiro, dated June 9th, 1908, filed for record June 9th, 1908, recorded in Book 1 of Deeds at page 321. Description: Lot twenty-six (26) in Block number seven (7) according to the plat of the Town of Cordova, recorded in Book 1 at page 10. [190—151]

Warranty Deed, George C. Hazelet, Trustee, to Carstens Packing Company, dated April 3d, 1909, filed for record April 4th, 1909, recorded in Book 3 of Deeds at page 49. Description: Covered by United States Survey No. 449 and by patent from the United States Government for same, Lot twenty-six (26) in Block number seven (7) recorded at Book 1 at page 10 of the records of Cordova.

It is further agreed that this stipulation may be offered and received in evidence in the above-entitled cause as competent evidence of the making of the several conveyances and mortgages hereinbefore described, the dates thereof, the recording thereof, as and when specified, and the descriptions of property affected thereby.

Dated at Cordova, Alaska, this 8th day of December, A. D. 1919.

DONOHOE & DIMOND,
By ANTHONY J. DIMOND,
Attorneys for Plaintiffs.
B. O. GRAHAM,
EDWARD F. MEDLEY,
Attorneys for Defendants.

Mr. MEDLEY.—In the matter of the deposition of defendants' witness, Robert Ashland; through some error the deposition was not completed when originally taken and a stipulation was thereafter entered into to complete it. At this time the completed original description has not been received by the Clerk of the Court, although I have received a letter from the attorneys at Vancouver, B. C., that it has been completed and mailed to the Clerk of

the Court at Cordova, Alaska, and enclosing me a copy; and it is now agreed between the attorneys that my copy shall be sufficient to be filed as the deposition itself.

Mr. DONOHUE.—The plaintiff stipulates that the copy in the hands of counsel for the defendant may be considered as a completed answer to the deposition, provided, however, if the original [191—152] deposition reaches the Court before finishing with the case, it may be considered as the original deposition instead of the copy. We can go on with that until the original arrives here.

Mr. MEDLEY.—I will now read the deposition of Mr. Robert Ashland, taken in pursuance to stipulation attached, as follows:

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA,
Defendants.

Stipulation Re Deposition of Robert Ashland.

It is hereby stipulated and agreed by and between the parties, plaintiffs and defendants, in the above-entitled action, by and through their respective attorneys of record, that the deposition of ROBERT ASHLAND, a witness on behalf of the defendants,

may be taken upon written, direct and cross interrogatories to be propounded to said witness at the time of taking said deposition, by the officer before whom said deposition shall be taken; that said deposition may be taken before any person authorized under the laws of British Columbia to take depositions, at such time and times as the person authorized to take depositions may fix therefor, provided said deposition shall be taken as soon as possible and immediately mailed to the Clerk of the District Court, Cordova, Alaska, and in no event shall the deposition be taken later than October 18, 1919.

It is further stipulated that said deposition when taken and reduced to writing and certified by said person authorized to take depositions and filed in the court, may be read at the trial of the above-entitled cause, or at any re-trial thereof, with the same force [192—153] and effect as if said witness appeared at said trial in person and orally testified.

It is further stipulated that each of the parties reserve all legal objections to the testimony given by said witness and all objections to the form of the interrogatory or cross-interrogatory and may interpose any and all legal objections to said testimony and to the competency, relevancy and materiality of any direct interrogatory or cross-interrogatory or any answer thereto at the time the said deposition is offered in evidence, whether said objections appear from said deposition to have been made at the time of the taking of the same, or not.

It is further stipulated and agreed that all objec-

tions as to the manner of certifying said deposition and transmitting same to the clerk of the court is hereby waived so long as it appears from said deposition and the certificate of the person authorized to take depositions attached thereto, that the witness was duly sworn before testifying and that the testimony contained in said deposition was given by said witness in accordance with this stipulation.

Dated at Cordova, Alaska, this 7th day of October, A. D. 1919.

DONOHOE & DIMOND,
By T. J. DONOHOE,
Attorneys for Pltffs.
EDWARD F. MEDLEY,
B. O. GRAHAM,
Attorneys for Defts.

Mr. MEDLEY.—(Reading:) In conformity with the foregoing and annexed stipulation the following interrogatories are propounded by the defendants to Robert Ashland, one of the witnesses named in said stipulation:

Deposition of Robert Ashland, for Defendants.

Int. No. 1. State your name, age and residence.

A. Robert Ashland. Age, 50. Residence, Manitoba Hotel, Vancouver, B. C.

Int. No. 2. If you ever were a resident of the town of Cordova, [193—154] Alaska, state between what years you lived there.

A. Yes. Between 1908 and 1910. 1908, 1909 and 1910—those three years.

Int. No. 3. State whether or not you ever were

(Deposition of Robert Ashland.)

the owner of Lot seven in Block 7 of the town of Cordova, Alaska; and if your answer is in the affirmative, state when and from whom you purchased said lot.

A. Yes. I bought it from the Cordova Townsite Company; Hazelet was the agent; about June or July, 1908.

Int. No. 4. State whether or not during the time you were the owner of said Lot 7 a building was erected on said lot, and if your answer is in the affirmative, state when said building was erected and by whom.

A. July or August, 1908, by myself.

Int. No. 5. State whether or not you know that a building was erected on Lot 8 of said Block 7, adjoining said Lot 7 on the south, and, if your answer is in the affirmative state when and by whom the building on said Lot 8 was erected.

A. Yes. By Henry Burkhart.

Int No. 6. State whether or not the buildings erected on said Lots 7 and 8 were so constructed when erected, that the buildings on said lots joined at the dividing line between said lots.

A. Second stories joined.

Int. No. 7. If your answer to the preceding question is in the affirmative, state whether or not a hallway between the buildings on said Lots 7 and 8 was left on the ground floor at the time said buildings were erected. A. Yes.

Int. No. 8. If you have stated that such a hallway was made when said buildings were erected, state

(Deposition of Robert Ashland.)

the approximate width and [194—155] height of said hallway, and how much each of said lots 7 and 8 was occupied by said hallway.

A. About 8 feet wide and about 12 feet high. About 4 feet of Lot 7 and 4 feet of Lot 8.

Int. No. 9. State whether or not you know who the owners were of Lots 25 and 26 in said Block 7, at the time the buildings were erected on said lots 7 and 8. For your guidance in answering this question, you are informed that Lot 26, Block 7, would be in the rear of Lot 7, Block 7, but facing on Second Avenue; said Lots 7 and 8 face on First Avenue of said town of Cordova.

A. Lot 25 was owned by Henry Burkhart and Lot 26 was owned by M. Finkelstein.

Int. No. 10. If your answer to the preceding question is in the affirmative, state who was the owner of Lot 26, Block 7, and who was the owner of Lot 27, Block 7, at the time the buildings were erected on said Lots 7 and 8.

A. The same owners.

Int. No. 11. The plaintiffs in the above-entitled case, in paragraph VI of their Amended Complaint, allege:

“That in the summer of the year 1908 Lot No. Seven (7) in Block No. Seven (7) of the said Town of Cordova was owned by Robert Ashland; Lot No. Eight (8) in Block No. Seven (7) was owned by A. E. Burkhart; Lot No. twenty-five (25) in Block No. seven (7) was owned by A. E. Burkhart; Lot No. twenty-six

(Deposition of Robert Ashland.)

(26) in Block No. seven (7) was owned by M. Finkelstein; that at the said time the owners of said lots were about to erect buildings on their respective lots and they then and there orally agreed to open an alley eight feet wide from First Street to Second Street in said Town of Cordova, the centre of said alley running along the dividing line between Lots No. 7 and 8 and Lots No. 25 and 26 in Block 7 of the said Town of Cordova. That the then owners of Lot 7 and Lot 26 in Block 7 gave four feet of their said lots along the southerly side thereof for said alley and the then owners of Lots 8 and 25 of said Block 7 gave four feet along the northerly side of their said lots for said alley. That said alley thereupon became known and ever since has been known and called Burkhart Alley. That shortly after said agreement the owners of the said four lots, heretofore described, erected buildings on their said respective lots, the side walls of said buildings [195—156] being four feet from the side line of said lots, thus leaving a public way eight feet wide from First Street to Second Street; that when the said owners of said lots erected buildings on their respective lots, they made various and many entrances into said buildings from Burkhart Alley and in all manner treated said Burkhart Alley as a public highway. At the time said alley was opened up it was agreed between the owners of said four lots that the four foot

(Deposition of Robert Ashland.)

strip given by A. E. Burkhart for said alley along the northerly side of Lot 25, about 18 inches thereof should be used for the walk following the grade of the alley, and the remaining 2½ feet should be used for higher walks not following the grade of the alley but on the levels of the floors of the buildings erected on said Lot 25 so that the occupants in the apartments of said buildings might conveniently reach the same from said alley.”

State whether or not any conversation was had between the owners of said four lots, at or prior to the time said buildings were erected, concerning the manner in which said buildings should be constructed. A. Yes.

Int. No. 12. If in answering the last question you have stated that there was any conversation between the owners of said four lots, at or prior to the construction of said buildings, state who was present during such conversation when said conversation, as nearly as you can determine, and what was said by the owners, of said four lots concerning the manner in which said buildings should be erected.

A. Well, I can't remember exactly who was present. I know Henry Burkhart's brother was present. Then Finkelstein, Henry Burkhart and myself had a conversation. They were all present at the same time. We agreed to build this hallway with the understanding that if at any time any of us wanted to close up the hallway, we had a perfect right to do so.

Int. No. 13. State whether or not at or prior to

(Deposition of Robert Ashland.)

the time said buildings were erected, there was ever any conversation between the owners of said four lots, relative to opening an alley eight feet wide from First Street to Second Street in said town of [196—157] Cordova, with the centre of said alley running along the dividing line between Lots 7 and 8 and between Lots 25 and 26 in Block 7 of said town of Cordova, and if your answer is in the affirmative state what was said and by whom.

A. This is answered by the answer to No. 12.

Int. No. 14. State whether or not, at or prior to the time said buildings were erected, there was ever any conversation between the owners of said four lots, relative to the owners of Lot 7 and Lot 26, in said Block 7, giving four feet of their said lots along the southerly side thereof for such alley, or the then owners of Lots 8 and 25 in said Block giving four feet along the northerly side of their said lots for said alley, and if your answer is in the affirmative, state what was said and by whom, and who was present at the time.

A. I have answered this already in Nos. 11 and 12.

Int. No. 15. State whether or not, at or prior to the time said buildings were erected, there was ever any conversation between the owners of said four lots relative to A. E. Burkhart leaving about eighteen (18) inches of the northerly four feet of said Lot 25 to be used for a walk following the grade of said so-called alley, and the remaining two and one-half ($2\frac{1}{2}$) feet of the northerly four feet of said Lot 25 being used for higher walks not follow-

(Deposition of Robert Ashland.)

ing the grade of said so-called alley, but on the levels of the floors of said building erected on said Lot 25 to enable the occupants of the apartments of such building to reach the same from said so-called alley; and, if your answer is in the affirmative, state what was said and by whom, and who was present at the time.

A. Yes. Two and a half feet. Only one foot and a half was taken for the alley from Lot 25, in order that if the other owners would close the alley there still would be access to the different [197—158] entrances in the apartment house.

Int. No. 16. State whether or not, at any time when you were the owner of said Lot 7, Block 7, there was ever any conversations between the owners of said four lots, or any of them, at which you were present, relative to making said so-called Burkhardt Alley a public highway, or a public alley, street or thoroughfare; and if your answer is in the affirmative, state what was said, by whom, who was present at the time, and approximately at what time said conversation occurred. A. No; never.

Int. No. 17. State whether or not, at the time you erected the building on said Lot 7, Block 7, you intended to dedicate the four feet of the southerly side of said lot to the public use as a highway.

A. No; never.

Int. No. 18. State whether or not, at the time you erected the building on said Lot 7, Block 7, you intended to retain control, dominion and possession of the southerly four feet of said lot. A. Yes.

(Deposition of Robert Ashland.)

Int. No. 19. State whether or not any conversation was had between the then owners of said four lots at or prior to the time of the erection of the said buildings thereon, relative to the right of any or all of the owners of said four lots to close or otherwise prevent the use of their respective portion of said so-called alley. A. Yes.

Int. No. 20. If you answered the last interrogatory in the affirmative, state when such conversation occurred, as near as you can determine the time, who was present, and what was said and by whom. [198—159] A. This is answered by No. 12.

Int. No. 21. State whether the plank foot-walk crossing the regular alley running north and south through said block and which connects that part of the so-called Burkhart Alley, between said Lots 7 and 8 and that part thereof between Lots 25 and 26, was constructed or maintained by the town of Cordova or by the owners of said lots.

A. It was constructed and maintained by the owners of the said lots.

(Direct examination closed.)

Mr. DIMOND.—I will read the Cross-Interrogatories.

Cross-Int. No. 1. Do you at this time own Lot 7 or 8 in Block 7 of the town of Cordova, Alaska, or any interests in said lots or either of them?

A. No.

Cross-Int. No. 2. State when you erected the building on Lot 7, Block 7, town of Cordova, Alaska.

A. About July or August, 1908.

(Deposition of Robert Ashland.)

Cross-Int. No. 3. Commencing with the year 1908, how long thereafter did you live and reside in said town of Cordova, and when did you last visit said town of Cordova?

A. I resided in the town of Cordova from its start about July, 1908, until late in the fall of 1910. My last visit was in September of last year. I visited Cordova once or twice every year.

Cross-Int. No. 4. It is a fact, is it not, that when you erected the building on Lot 7, Block 7, in 1908, you constructed the south wall of said building four feet north of the south line of said lot, thereby leaving four feet for an alleyway and when A. E. Burkhardt constructed the building on Lot 8, Block 7, he constructed the north wall of his building four feet south of the north line of Lot 8, thereby leaving four feet for an alleyway and [199—160] this made an eight foot alleyway between the buildings on Lot 7 and the building on Lot 8, as high as the second floor of said building? A. Yes.

Cross-Int. No. 5. It is a fact, is it not, that when M. Finkelstein erected the building on Lot 26, Block 7, he constructed the south wall of his building four feet north of the south line of said lot, thereby leaving four feet for an alleyway and when Burkhardt and Barber erected the building on lot 25, in Block 7, they constructed the north wall of this building four feet south of the north line of this lot, thereby leaving four feet for an alleyway, except as this four feet was occupied by a high walk along the

(Deposition of Robert Ashland.)

floor levels of this building?

A. Yes; except two and a half feet of Lot 25.

Cross-Int. No. 6. It is a fact, is it not, that when the building on Lots 7 and 8 and on Lots 25 and 26 in Block 7, were erected in the fall of 1908, there was an eight-foot alleyway, excepting that part occupied by the high walk along the building on Lot 25, from First Street to Second Street, through and over which the general public traveled every day?

A. Yes; anybody could travel through there, with our permission, of course. We could close it up at any time.

Cross-Int. No. 7. It is a fact, is it not, that when this alleyway was first opened up for the public to travel back and forth, the high walk along the building on Lot 25 had been erected and that this alleyway was in the same condition as to width when you were last in Cordova as it was when it was first opened in 1908? A. Yes.

Mr. DIMOND.—The answers to the remaining cross-interrogatories, as [200—161] shown by copy furnished by counsel, are as follows:

Cross-Int. No. 8. It is a fact, is it not, that from the time Burkhart Alley was first opened up until the time you left Cordova, the general public traveled through and over it continuously without permission from anyone and without any hindrance or objection being made by anyone?

A. The answer is the same as No. 6. Anybody could travel through there with our permission, of course, but it could be closed up at any time.

(Deposition of Robert Ashland.)

Cross-Int. No. 9. It is a fact, is it not, that during the time you were the owner of any of the property bordering on Burkhart Alley you did not do any act to prevent the general public from the free use of it as a public highway. If you answer that you did, state in detail what acts you did to so prevent it being used as a public highway? A. No.

Cross-Int. No. 10. When you were negotiating with McDonald & Reidy for the sale of Lot 7, in the year 1910, and at a time when you were the owner of said Lot 7 of Block 7, did you not state to David McDonald that Burkhart Alley was a great advantage to this property and that when the alley was first opened up it was agreed between the owners of the four lots bordering on the alley that it could not be closed, except with the consent of all the owners of said four lots or make a statement to him in words to this effect? A. No.

Cross-Int. No. 11. It is a fact, is it not, that in 1908, it was agreed between the owners of the lots bordering on Burkhart Alley, that this alley could not be closed by any of the owners of these lots, except with the consent of all of said owners? [201—162] A. No.

Cross-Int. No. 12. It is a fact, is it not, that when you commenced business in the building on Lot 7 and during all the time you were engaged in business there, you considered it an advantage to have Burkhart Alley open as a public highway and to have the public use it freely as a highway?

A. Yes.

(Deposition of Robert Ashland.)

Cross-Int. No. 13. Was not Burkhart Alley opened up as a public highway in 1908 because you wanted to be on a street corner with your saloon business on Lot 7; Burkhart wanted to be on a corner with his business on Lot 8 and Finkelstein wanted to be on a corner with his clothing business on Lot 26? A. Yes.

(Signed) ROBERT ASHLAND.

I hereby certify that on the 15th day of October, 1919, Robert Ashland appeared before me at my office in the Winch Building, Vancouver, British Columbia, and first having been sworn by me to tell the truth, the whole truth and nothing but the truth, made answer to the interrogatories and cross-interrogatories propounded to him by the defendants and plaintiffs respectively; that his answers to the same were taken down in shorthand, and having been transcribed into longhand they were on the 17th day of October, 1919, read over and signed by him as corrected.

IN WITNESS WHEREOF I have hereunto attached my hand and seal of office this 17th day of October, 1919.

[Notarial Seal]

W. J. BAIRD,

A Notary Public in and for the Province of British Columbia.

My Commission is indeterminate in time.

I hereby certify that on the 25th day of November, 1919, Robert Ashland appeared before me at my office in the Winch Building, Vancouver, British Columbia, and first having been sworn by me to tell the truth, the whole truth and nothing but the truth,

(Testimony of H. A. Slater.)

made answer to [202—163] the cross-interrogatories propounded to him by the plaintiffs and contained in the stipulation of the 7th day of October, 1919, and by inadvertence unanswered on his previous appearance before me on the 15th day of October, 1919; that his answers to the same were taken down in shorthand and having been transcribed into longhand they were on the said 25th day of November, 1919, read over and signed by him as correct.

IN WITNESS WHEREOF I have hereunto attached my hand and seal of office this 25th day of November, 1919.

W. J. BAIRD,
Notary Public.

Mr. MEDLEY.—We will file this copy to supplement the original.

The COURT.—Very well.

Mr. MEDLEY.—We will call Mr. Slater. [203—164]

Testimony of H. A. Slater, in His Own Behalf.

H. A. SLATER, one of the defendants, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. MEDLEY.)

Q. State your name and residence.

A. Henry A. Slater; Cordova, Alaska.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. You are the owner of Lot 7, Block 7, in the town of Cordova? A. Yes, sir.

(Testimony of H. A. Slater.)

Q. Have you served on the Common Council of the Town of Cordova? A. Yes, sir.

Q. How many terms? A. I served five years.

Q. Do you know what years you served?

A. I think 1912, 1913, 1914, 1915, 1916 and 1917.

Q. Did you ever serve as Mayor?

A. Two terms.

Q. Did you ever hold any other official position in the town of Cordova? A. City Assessor.

Q. How many years did you act as City Assessor?

A. Three years—1917, '18 and '19.

Q. Now, Mr. Slater, you of course are familiar with what is known as Burkhart Alley?

A. Yes, sir.

Q. Part of your residence on Lot 7, Block 7, and part of your building on Lot 7, Block 7, completely covers a portion of Burkhart Alley adjoining your lot or on your lot? A. Yes.

Q. Were you a regular attendant at meetings of the City Council [204—165] when you served thereon? A. Yes, sir.

Q. During the five terms that you served as city councilman, did the Council ever consider and treat Burkhart Alley as a public highway?

Mr. DONOHOE.—We object as a conclusion. Let him state what the Council did do with reference to Burkhart Alley.

The COURT.—He may state what was done.

Q. Was anything ever done in that respect to your knowledge by the City Council?

A. No, sir.

(Testimony of H. A. Slater.)

Q. Referring to your duties as City Assessor, will you tell the Court what they were?

A. I assessed the values in the Town—real estate and improvements and personal property.

Q. Calling your attention to Lot 8 in Block 7, owned now, I believe, by the Bank of Alaska—while you were city assessor did you assess the full width of that lot as shown by the plat? A. I did.

Q. The full 25 feet? A. Yes, sir.

Mr. DONOHUE.—We object as leading.

Q. State whether or not you did assess the full width of that lot.

A. I did assess those lots the same as other lots in the town.

Q. State whether or not in fixing the assessment on Lot 8 in Block 7 and on Lot 7 in Block 7 you considered their width as 25 feet?

Mr. DONOHUE.—We object to what he considered. He has told what he did—he assessed the lots. We object as calling for a conclusion of the witness.

The COURT.—You are asking how he arrived at the assessment? [205—166]

Mr. MEDLEY.—I will put the question again.

Q. State whether or not in setting the value on Lot 7 in Block 7 when you were acting as assessor, you based your assessment, your estimate of the value, on the lot as a 25 foot lot?

A. I did; yes, sir.

Q. Now, state whether or not, Mr. Slater, while you acted as assessor in estimating the value of Lot

(Testimony of H. A. Slater.)

25 and Lot 26 in Block 7, you based your estimate of the value on 25 ft. lots? A. I did.

Q. State whether or not you were the owner of Lot 7 in Block 7 during the times you made the assessment? A. I was; yes.

Q. Now, Mr. Slater, I wish you would tell what you did when you went to the City Council about closing this lot—what you said to the Council?

A. Well, I was figuring on building on the lot—
The COURT.—Fix the time.

Mr. MEDLEY.—It is the time referred to by Mr. Lathrop as this year.

Mr. DONOHOE.—I move the witness be instructed in answering to relate what he did or what he said or what the members of the Council said at this meeting.

The COURT.—Tell what was said, and what was done—not any conclusion.

Q. What was said by you and what was said by the members of the Council?

A. I was figuring on building on that lot—

Mr. DONOHOE.—We move to strike that.

Q. Tell what you did.

A. I appeared before the Council—I came before the Council and told them that I expected to use that alley, not that I thought [206—167] they had any right—

Q. Tell what you said.

A. I came up before the Council and told them I expected to use the alley and asked them if there was any objection, not because I thought they had any right—

(Testimony of H. A. Slater.)

Mr. DONOHOE.—We object to that.

Mr. GRAHAM.—I think he may explain why he did that.

The COURT.—He may state what he said to the Council and what was said to him.

Q. What did the Council say?

A. The Council told me that they had no objection to my using the alley—that is, a majority of the Council.

Q. Told you to go ahead and use it?

A. They did.

Q. Did any member of the Council object?

A. One.

Q. Which one? A. Mr. Lathrop.

Q. Is he one of the plaintiffs in this suit?

A. He is.

Q. What did he say about it?

A. He said that if the Burkhart Alley was closed, they would take up the crossing and he would be damaged.

Q. State whether or not he said this—

Mr. DONOHOE.—We object to that—let him state what he said.

Q. Did Mr. Lathrop have any objection to closing the alley, if the crossing was not disturbed?

Mr. DONOHOE.—We object on the ground that it is leading—let the witness state what Mr. Lathrop said.

The COURT.—State as near as you can what was said and done by the Council? [207—168]

A. Mr. Lathrop said at the meeting that he ob-

(Testimony of H. A. Slater.)

jected to the alley being closed because they would take the crossing up if the alley was closed and it would damage his property.

Q. It would result in the taking out of the crossing?

A. It would result in the taking out of the crossing; yes, sir.

Q. What crossing did he refer to?

A. The one leading from the Burkhart Alley.

Q. On what street? A. First Avenue.

Q. Were you on the City Council in 1914?

A. Yes.

Q. The plaintiff has read in evidence here certain extracts from minutes of the City Council referring to moving or placing of fire hydrants at each end of the alley in the middle of Block 7—do you remember such action by the City Council?

A. Yes, sir, I do.

Q. What was the reason the City Council desired to place the fire hydrants at such places?

A. It was in the middle of the block. That was a long block between B and C and they thought for fire protection they should have hydrants there, one on First and one on Second Avenue.

Q. Mr. Slater, state whether or not you ever objected to any person using that alley?

A. No, sir, I did not.

Q. Did you ever have any knowledge of anybody representing the City, or did anybody representing the city ever inform you that that alley was claimed as a public highway? A. No.

(Testimony of H. A. Slater.)

Q. State whether or not you ever had any knowledge of the fact that [208—169] the public, in using the alley, was creating a public highway.

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained; defendants allowed an exception.

Q. State whether or not you ever intended by allowing the public to use the alley to dedicate the road to the public.

Mr. DONOHOE.—We object as to what he intended as incompetent and irrelevant—what he did is the question.

Objection sustained; defendants allowed an exception.

Q. While you were the owner of Lot 7 in Block 7 did anybody ever insist to you that they had a right to use the alley? A. No.

Q. State whether the public using the alley ever inconvenienced you in the use of your property.

A. No, sir.

Q. State whether or not you know who paid for the lights in the alley.

A. No, I couldn't say who paid for the lights in the alley.

The COURT.—Go back to the question I sustained the objection to—while it would not be controlling in the case, I think that question is competent after all. He may have intended to dedicate it and may not—in the form the question is put, I think it is competent.

(Question read as follows:)

(Testimony of H. A. Slater.)

Q. State whether or not you ever intended by allowing the public to use the alley to dedicate the road to the public. A. No, I did not.

The COURT.—I take it that acts are really controlling; however, in the form the question is put, I believe it is competent.

Q. Mr. Slater, state whether or not while you had charge and owned [209—170] that block—that lot, not block—the city ever repaired the sidewalk on First Street in front of the alley?

A. No, sir.

Q. Who repaired it? A. I did.

Q. You repaired the sidewalk in front of the alley the same as you did the sidewalk in front of the drugstore? A. Yes, sir.

Q. Do you know who repaired the sidewalk in front of Lot 8? A. Mr. Burkhart.

Q. State from your experience as a councilman whether the City repairs those parts of the sidewalk where the public alley running north and south through the centre of the block crosses the sidewalks through the main streets.

A. Yes, sir, they do.

Q. The city repairs them? A. Yes, sir.

Q. Now, Mr. Slater, what would you say as to the extent of the travel through Burkhart Alley as compared with the travel on B & C Streets?

A. I can't make any comparison; I have heard people make it, but I can't draw any conclusion, but I think when the postoffice was on Second Avenue there was a great deal of travel through the alley,

(Testimony of H. A. Slater.)

but at the present time I don't think there is much travel through it.

Q. When the postoffice was in the Ostrander Building would you say the travel through the alley was about the same as B or C Streets or more or less?

A. I don't think it would be more—it may be less; I think it would be less—I couldn't say; I don't know. [210—171]

Q. You testified that as assessor you assessed the four lots described in this complaint as 25 ft. lots?

A. Yes.

Q. State whether or not you as the owner of Lot 7 in Block 7 paid taxes on the assessment as made by you? A. I did.

Q. Do you know the width of the alleys in the town of Cordova? A. No, I do not.

Q. Are they wider or narrower than the Burkhart Alley?

A. They are wider than the Burkhart Alley—the alleys of the town must be about 20 feet.

The COURT.—That is shown by the plat.

Mr. MEDLEY.—That's all.

Cross-examination.

(By Mr. DONOHUE.)

Q. What was the first year that you served as councilman? A. I think it was 1912.

Q. And then did you serve each succeeding year for five years? A. Yes, sir.

Q. And then you served up until the spring of 1917? A. Yes.

(Testimony of H. A. Slater.)

Q. I understood you to say that during all the time you were on that council you had no knowledge of the councilmen exercising any supervision over or doing anything connected with the Burkhart Alley?

Mr. MEDLEY.—He didn't say that.

Mr. DONOHUE.—I will change that—

Q. Did the Council while you were on it do anything with relation to Burkhart Alley, such as ordering lights for it or sidewalks repaired or placing hydrants opposite it, or lamp-posts opposite [211—172] it, or anything of that sort?

A. When I was on the Council?

Q. Yes.

A. I don't know anything about the lights—I remember about the hydrants, though.

Q. You remember the placing of hydrants?

A. Yes, sir.

Q. I believe you said those hydrants were placed in the middle of the block, of Block 7?

A. Yes, about in the middle of 7.

Q. You said in the middle? A. I think so.

Q. You know that the middle of the block would be 25 feet further south than they are placed?

A. They are placed at the dividing line between 7 and 8.

Q. It should be the dividing line between 8 and 9? A. You may be right.

Q. You don't know as a matter of fact that those hydrants were placed where they were placed particularly to be opposite the entrance to Burk-

(Testimony of H. A. Slater.)

hart Alley, so in case of fire you could work the hose through Burkhart Alley?

Mr. MEDLEY.—We object to that is incompetent, irrelevant and immaterial.

Objection overruled; defendants allowed an exception.

A. It may have been.

Q. Now, do you recall during the time that you were on the Council of the lamp-post on Second Street being moved south about 52 feet in order to be opposite Burkhart Alley and light the alley?

A. I do.

Q. You remember that being done by the Council? [212—173] A. Yes.

Q. You attended the Council meetings regularly, did you? A. Yes.

Q. Do you recall, at this time, Mr. O'Neill, on May 18, 1914, then a partner with you in the ownership of Lot 7, appearing before the Council and asking that a light be placed in Burkhart Alley?

A. I don't recall that to mind; no, sir.

Q. If the record shows such thing, it is your opinion that it is true?

A. Yes, sir; I think it is true, all right.

Q. I will ask you, while you were a member of the Council in December, 1916, if you remember this matter coming before the Council. It is on page 437, Book One, of the minutes of the City Council of the Town of Cordova. It was reported that Burkhart Alley was in bad condition and it was decided the owners should be notified to have

(Testimony of H. A. Slater.)

it repaired? A. I don't recall the incident.

Q. It is your judgment, though, that it took place, if it appears on the records that way?

A. Yes.

Q. You heard the City Clerk read the extracts from the record yesterday? A. Yes, sir.

Q. And you have no reason to believe that the records are in any way false?

Mr. MEDLEY.—We object to that as not cross-examination.

Mr. DONOHUE.—I will withdraw the question.

Q. In regard to this assessment—it is a fact, is it not, that you assessed all lots as they appear upon the plat, without reference [213—174] to feet? A. Yes, unless it is a fraction of a lot.

Q. You say in 1917 you were the assessor?

A. Yes.

Q. You assessed your lot 7 for \$5,000, did you not? A. Yes.

Q. And you assessed lot 8 for \$5,000?

A. Yes.

Q. You assessed the two lots adjoining 7, Numbers 5 and 6, for \$15,000, 50% higher than your own—\$7,500 a lot? A. Yes.

Q. And you assessed Mr. Hazelet's lots, just below Lot 8, at a considerably higher figure than you assessed Lot 8? A. Lot 7—yes.

Q. In the deeds you obtained to Lot 7 the description was not by metes and bounds but by lots—it wasn't by feet? A. No.

(Testimony of H. A. Slater.)

Q. And 7 and 8 have always been treated as far as you know as lots that appear upon that plat, without reference to the feet? A. Yes.

Q. Now, Mr. Slater, during all the time that you were the owner of Lot 7 in Block 7, there was considerable public travel through that alley, was there not? A. Yes, sir.

Q. Did you ever do anything, up until last September, when you put up the fence—previous to that, did you ever do anything to in any manner impede the public travel through that alley?

A. I did not.

Q. You never protested in any manner or made any objection to anybody traveling through? [214—175] A. No.

Q. You never put up any sign at the First Street entrance that it was private property, at the entrance to the alley? A. No, sir.

Q. There was not to your knowledge any sign in the alley saying it was private property?

A. Not to my knowledge.

Q. Previous to appearing before the Council this fall, just previous to putting up the fence, you had individual talks with practically all the members of the Council and asked them individually if they had any objection?

Mr. MEDLEY.—We object to that question, unless they are dealing with the Council officially.

Objection sustained.

Mr. DONOHUE.—I am not particular about the question. That is all.

(Testimony of H. A. Slater.)

(By Mr. MEDLEY.)

Q. Mr. Slater, as assessor, you are familiar, naturally, with the real estate values in Cordova?

A. Yes.

Q. What is the most valuable block in Cordova as to valuation?

A. The highest assessed lot in town is the Alaska Hotel.

Q. The block, not building? A. Block 7.

Q. That is the block in which the so-called Burkhardt Alley is located? A. Yes, sir.

Q. State whether or not that fact had anything to do the placing of these hydrants in Block 7 as referred to in these Council meetings, at the end of Burkhardt Alley. [215—176]

A. Yes, it did have. Block 7 being the most valuable block in town, they thought it needed more fire protection; therefore those hydrants were placed on First and Second Avenue.

Q. Tell the Court why you did not protest or object to people using the alley.

A. I have no objection to people using my property when I am not using it.

Q. Did the public use of the alley inconvenience you in any way? A. No, it did not.

Q. If it had inconvenienced you, would you have objected to the public travel?

Mr. DONOHUE.—We object to that.

Objection sustained; defendants allowed an exception.

Q. Mr. Donohoe has asked you a question as to

(Testimony of H. A. Slater.)

why you assessed his two lots at \$15,000 and your own at \$5,000?

A. Because his is 50 feet with a good building on it. It is assessed at \$15,000. If you go down further to 12, 13 and 11; those are 25 foot lots with 100 feet depth and are assessed at \$7,500. The building Lots 7 and 8 are poor buildings; that is why the low value was placed on these lots, but the other lots, 25 feet, with buildings, on First Avenue are assessed at \$7,500.

(By Mr. GRAHAM.)

Q. Mr. Donohoe has asked you whether or not you had a sign up, at the other end of this lot—I will ask you whether or not it is customary in Cordova to put up signs on buildings, private property? A. No. [216—177]

(By Mr. MEDLEY.)

Q. Do you know of any other alleys in Cordova, private alleys, similar to that Burkhart Alley?

A. I do.

Q. Where is it?

A. Between Lots 12 and 13, First Avenue.

Q. In what block? A. Seven.

Q. Where does the alley run from?

A. Between the Model Restaurant and the City Bakery.

Q. From First Avenue through the alley running north and south, the same as this alley, in this same block? A. Yes, sir.

Q. Who owns the buildings, the lots where that alley is? A. Tom Davidson and myself.

(Testimony of H. A. Slater.)

Q. Is that alley covered over? A. Yes, sir.

Q. Is it used by the public, by anybody that wants to use it—any objection ever made?

A. No.

Q. You consider that your own private property? A. I do.

(By Mr. DONOHOE.)

Q. Mr. Slater, how wide is that alley you have just testified to? A. Four feet.

Q. You took the precaution to put a gate on each end?

A. No, on one end—to keep the dogs out.

Q. There is a gate at this end?

A. No. [217—178]

Q. There is no obstruction there at all?

A. The door is off; it came off three years ago. There was a door there, but the door blew off two or three years ago.

Q. And you never put it back on?

A. No, sir.

Q. Do you want to be understood as saying that that alley has ever been used like the Burkhart Alley?

A. No, it don't go clear through the block, only back to the alley.

Q. You know, as a matter of fact, do you not, Mr. Slater, that that alley is not used as a thoroughfare for people going through at all?

A. They can use it, and they do use it.

Q. Where do they go?

A. Back to the alley—people living back in the

(Testimony of H. A. Slater.)

cabins, back there, and in the Borden Building, they go back through there.

Q. And do you think it has been generally traveled?

A. By people that go back through that way, yes.

Q. But people that don't live in the rear there, don't go through it? A. No, not much.

(By Mr. MEDLEY.)

Q. What did you have a gate on the alley for?

A. To keep the dogs out.

(By Mr. DONOHUE.)

Q. You had a gate there from the time you put up this building? A. No, I did not.

Q. You have one there now? A. Yes, sir.

Q. And when were those buildings erected?
[218—179]

A. I put that story, that second story, on the Restaurant building in 1910, I think.

Q. Up to that time, there was no cover over this runway? A. No.

Q. Going back to the assessment on Lot 7 which you say is assessed 50% lower than my assessment on Lot 6—you stated that I have a good building on it. Is it not a fact that your Lot 7 has a 100 foot building, 20 feet wide and 100 feet long, with two stories? A. Yes.

Q. And my building is a building 50 feet wide, two stories, and 100 feet long?

A. The difference between your building and mine is that mine brings in \$100 per month for

(Testimony of H. A. Slater.)

the whole building—that is all the revenue it brings in.

Q. How about 1917?

A. It wasn't bringing in quite that much.

Q. Mine is only bringing in \$200.

A. There are very poor rooms upstairs—very dark and very poor.

Witness excused. [219—180]

Testimony of John J. Goodale, for Defendants.

JOHN J. GOODALE, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. MEDLEY.)

Q. What is your name and residence?

A. John J. Goodale; Cordova.

Q. How long have you lived in Cordova?

A. Since 1908, I guess; early spring of 1908.

Q. Have you served on the Common Council of the town of Cordova? A. Yes, sir.

Q. When? A. 1914, I think it was.

Q. You served one term?

A. I served one term.

Q. What committee did you serve as chairman of the year you were on the Council?

A. I was chairman of the street committee and the police committee.

Q. Did you ever hold any other official position in the town of Cordova? A. Yes, assessor.

Q. When was that?

(Testimony of John J. Goodale.)

A. I was the first assessor of the town.

Q. 1911? A. Yes.

Q. You were the first assessor of the town?

A. Yes.

Q. You are familiar with what is known as Burkhart Alley? A. Yes, sir.

Q. Was that alley where it is now, at that time?

A. Yes.

Q. Was it in the same condition in 1911 when you were assessor? [220—181] A. Yes.

Q. You proceeded to determine the values in 1911? A. Yes.

Q. I call your attention to Lot 7 and Lot 8 in Block 7 and Lots 25 and 26 in Block 7; in determining the values of those lots for the assessment, did you consider them as 25 foot lots?

A. Yes, sir.

Mr. DONOHOE.—We move to strike the answer as incompetent, irrelevant and immaterial, as to what he considered in making up his assessment.

Motion denied; plaintiffs allowed an exception.

Q. Do you remember what you assessed that property at?

Mr. DONOHOE.—We object as not the best evidence.

The COURT.—You may state if you know.

A. Yes, I do.

Q. What did you assess it at? Lots 7 and 8 in Block 7?

Mr. DONOHOE.—Same objection.

(Testimony of John J. Goodale.)

Objection overruled; plaintiffs except.

A. The total assessment of the property—

Q. Those two lots I mean, Lot 7 and 8, in Block 7? A. It was \$5,400, I think, for each.

Q. In determining the value put on these lots, did you first figure the value of the real estate and then the value of the improvements?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial, and leading.

Objection sustained as leading.

Q. State whether or not in determining the value you put on lots for assessment—

The COURT.—Ask him how he determined the value. How did you determine [221—182] the value of the property to be assessed, for instance, on Lot 7 in Block 7?

A. The town had never been assessed and I started in—I took the Adams corner as the basis—

Q. Give me the number of those lots.

The COURT.—He can determine how he arrived at the valuation of Lot 7 in Block 7.

Q. Tell the Court how you figured or determined the valuation you put on Lot 7 and Lot 8 in Block 7.

A. I put the valuation on the lots in that block at \$3,000 for each lot excepting corners—there was different valuations in the corners. Each of the lots through the block was \$3,000 on this side of the street.

Q. And then you added whatever you thought the improvements were worth?

(Testimony of John J. Goodale.)

A. Yes, then I figured the improvements and made the total assessment that way.

Q. Did you figure all the inside lots in Block 7 as the same valuation?

A. On this side of the street I did, but on the other side—

Q. That is a different block?

A. Yes, that is a different block. There was different values on Second Street, of course.

Q. On First Street—

A. On First Street all the same.

Q. All inside lots were the same?

A. Yes, sir.

Q. Did you or did you not reduce the valuation of Lot 7 and Lot 8 and 25 and 26 in Block 7 because of the Burkhart Alley?

Mr. DONOHOE.—We object to that as leading and incompetent, irrelevant [222—183] and immaterial.

The COURT.—He may answer.

A. I did not.

Q. During the term that you served as a member of the City Council, did the Council in any manner consider the Burkhart Alley as a public alley?

A. I don't know just what you mean by that. There was considerable travel through the alley, and it was used a great deal.

Q. Did the Council consider that they had control of the alley like other public alleys in the town of Cordova? A. Why, I don't think so.

(Testimony of John J. Goodale.)

Mr. DONOHUE.—We object to that question, and move to strike answer.

The COURT.—What he thinks may be stricken.

Q. Do you know whether they did or not?

A. They did not.

Q. As chairman of the street committee during the year you served on the Council, did you officially treat Burkhart Alley as a public highway, a public alley, and under your control and dominion as an officer of the town of Cordova?

Mr. DONOHUE.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—As to whether the Council considered it a public alley or a private alley, I don't see that it makes very much difference—I am disposed to let him answer the question, but it is so remote that it seems almost immaterial. He may state fully what he did as chairman of the street committee with reference to Burkhart Alley.

Plaintiffs allowed an exception to the ruling.

Q. Did you ever do anything during the year you were on the Council and chairman of the street committee toward Burkhart Alley as a public alley and if you say you did, state what you did?

A. Well, I don't remember that I did anything as chairman of the [223—184] street committee, but I think on one or two occasions I saw planks broken in the alleyway there and it was part of my duty as chairman of the police department to see there was no danger there by the public travel-

(Testimony of John J. Goodale.)

ing through and I notified the owners there to repair it, to protect anyone traveling through.

Q. Who repaired and maintained that portion of the sidewalks in Cordova where the public alley through the blocks crossed the sidewalks to the main street?

A. You mean the plank in the alley itself?

Q. No; for instance, I refer to this Block 7; the public alley runs north and south through the block; when it crosses the sidewalk on C Street or B Street,—there is a portion of the sidewalk that it crosses—who repairs and maintains that portion of the sidewalk?

A. Why, the property owners; they maintain the sidewalk on the street, on Second Street or on First Street.

Q. The sidewalk in front of the buildings?

A. Yes, the sidewalk in front of the buildings.

Q. But the sidewalk in front of the public alley— A. I think the city.

Q. Did the city maintain the sidewalk in front of Burkhart Alley on First and Second Street?

A. Yes, they did.

Q. Mr. Slater testified that he and Mr. Burkhart—

Mr. DONOHOE.—I object to counsel cross-examining their own witness.

The COURT.—He may answer.

The WITNESS.—I think once or twice—there were some occasions, planks put into the sidewalk almost anywhere that the city would pay for it—

(Testimony of John J. Goodale.)

if the owners neglected it and there was danger to [224—185] anyone, they would put it in.

Q. You own any real estate in Cordova?

A. I do.

Q. State whether or not you are familiar with real estate values and rental values in Cordova?

A. Yes, I think so.

Q. Have you charge of any property in Cordova?

A. Yes, sir.

Q. Where is it located?

A. I have the postoffice building, for instance, and some in the next block.

Q. You are familiar with Mr. Lathrop's building and its location? A. Yes.

Q. Give your opinion whether Mr. Lathrop's building will depreciate in value if Burkhart Alley is closed?

A. Of course, that is something I can't say, I don't know.

Q. You are not competent?

A. I don't feel competent—I don't know from what angle it might be figured.

Q. Give your opinion as to whether the Borden Building, which you have charge of, will depreciate in value by the closing of Burkhart Alley?

A. I don't know of any depreciation—I don't know.

Q. Is it your judgment that it will or will not?

A. I don't think it will.

Q. Now, you use Burkhart Alley to go from First to Second Street? A. Quite frequently.

(Testimony of John J. Goodale.)

Q. Are you familiar with the fact that the public use it? A. Yes.

Q. What is your opinion as to the extent of the travel through [225—186] Burkhart Alley as compared with the travel on B and C Streets?

A. Well, it is considerably traveled through there—it may be as much traveled as it is on Second Street; of course, it wouldn't compare with the travel on First Street.

Q. I put it B and C Streets?

A. I couldn't say—there is considerable travel.

Q. Do you think there is more travel through the alley than on B or C Streets or about the same?

A. I should think probably about the same.

Q. There was more when the postoffice was on Second Street? A. Yes.

Q. There was read in evidence here yesterday by Mr. Robinson, the city clerk, an extract from the minutes of the Common Council as follows: October 21, 1912. Notice was given that a street light was wanted in the alley at the intersection of Burkhart Way and at various other points. The matter was referred to the Committee on Light with authority to use their own judgment in ordering new lights. Do you remember where that light was put in in Burkhart Alley?

A. Yes, sir, just about in front of the alley, up here on Second Street.

Q. This is at the intersection of Burkhart Alley and the other alley?

(Testimony of John J. Goodale.)

A. Yes, there was a light there—at the corner of the building there.

Q. How was it arranged? Do you know where the light is now?

A. Yes, I know about where it is. I remember the light that is on the corner of the Slater property—I think it was fastened to the buildings—I think it is either a piece of iron or pipe, I think pipe, fastened on to the building and jutting out and I think the wire ran through the pipe and connected with the light. [226—187]

Q. On to the public alley?

A. Yes, it was changed around. I don't know whether it is exactly on the corner now or in the center. It was changed on account of the snow drifting from the roof.

Q. The light is underneath the roof?

A. I don't know whether it is on the side or in the center.

Q. Fastened to the building? A. Yes, sir.

Q. You know it was not originally placed there? The light as originally placed was in the public alley?

A. Yes, it was originally out in the public alley but the iron was fastened to the corner of the building.

(By Mr. DONOHOE.)

Q. The light was put there for the purpose of lighting Burkhart Alley?

A. I suppose that is what it was for, and some of the other alley coming along there.

(Testimony of John J. Goodale.)

Q. You don't know of any other light maintained by the city in any of the alleys in the town of Cordova?

A. I don't know whether there is another at the other corner or not, I couldn't say.

Q. Do you know what the city paid for that light? A. No, I do not.

Q. You don't know whether they paid for it or not? A. I don't remember about that.

Q. You remember this matter coming up before the council when you were there?

A. I remember there was some talk about it, yes, —I don't remember what they did, though. [227—188]

Q. You were a member of the street committee, chairman? A. Yes, sir.

Q. Then you must have ordered that light put there?

A. No, that would be the chairman of the Light and Water Committee.

Q. Now, in regard to the Borden property and no depreciation in value as you have testified—that building is occupied by the United States postoffice?

A. Yes.

Q. It has no mercantile establishments in it at all? A. Not now; no.

Q. And the income of that property is not dependent upon customers or people doing business there?

A. Not at the present time; no.

Witness excused. [228—189]

Testimony of W. L. Smith, for Defendants.

W. L. SMITH, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. MEDLEY.)

Q. What is your name and residence?

A. W. L. Smith; Cordova.

Q. How long have you lived in Cordova?

A. I have been in Cordova since April 24, 1908.

Q. You have lived here continuously since then?

A. Yes, here in Cordova.

Q. Have you ever served on the Common Council of the town of Cordova? A. I have; yes.

Q. How often?

A. I think I was on three years.

Q. What years were they?

A. I think in 1914, '15 and '16, or '17, which ever it is.

Q. I think you ended in April, 1917? A. Yes.

Q. Were you at any time chairman of the street committee of the town of Cordova, while you served on the council? A. For two years.

Q. What were your duties as chairman of the street committee?

A. To look after the streets and alleys.

Q. Do you know where the so-called Burkhart Alley is in Cordova? A. Yes, sir.

Q. Did you look after Burkhart Alley as chairman of the street committee?

A. No, the alley in between the buildings I had

(Testimony of W. L. Smith.)

cut down a time or two, there in the alley proper, not the Burkhart, no, but in the main alley in between the two buildings.

Q. Running north and south? [229—190]

A. Yes, running north and south—I done some work on that; yes, sir.

Cross-examination.

(By Mr. DONOHOE.)

Q. What was the work done on the alley for?

A. Cutting the ice down on the street. They shoveled the ice off of the buildings on to the alley and I had to have it cut out and thrown on one side a time or two.

Q. Where the Burkhart Alley crosses the regular alley? A. Yes, sir.

Q. Cut it down to make a passage back and forth through the Burkhart Alley?

A. No, through the main alley, north and south.

Q. Was there any foot travel between the regular alley?

A. Yes, some, but on account of teams I had to have it cut down.

Q. You also cut it down where it interfered with the crossing of Burkhart Alley?

A. I had it cut down in between the streets, not in between the buildings, no.

Q. Where did you have this ice cut out?

A. There is a 14 foot alley runs north and south.

Q. And this alley crosses the Burkhart Alley and the alley in between down there? A. Yes.

(Testimony of W. L. Smith.)

Q. You had that ice cut out?

A. I had that ice cut out.

Q. At the intersection of the Burkhart Alley and the regular alley?

A. Well, it was the regular alley that I had the snow cut out of, the ice,—so teams could get through.

Q. While you were on the council, do you remember the council at any time notifying or ordering the chief of police to notify the [230—191] owners along Burkhart Alley to repair their sidewalks?

A. Why, not that I remember of—they might have done it too but I don't remember exactly.

Q. Do you know in 1914 of the City Council ordering hydrants to be placed opposite each end of the Burkhart Alley?

A. Not that I remember—no, I don't remember that.

Q. To refresh your memory I read from the minutes of July 6, 1914—June 6, 1914, not July—on page 332, Book One of the minutes of the Town Council, as follows: It was moved and seconded that the placing of hydrants on First and Second Streets opposite Burkhart Alley be referred to the Fire Committee with power to act. The motion prevailed. Do you remember that transaction?

A. Why, it may have happened but I don't remember it—it is so long ago.

Q. Do you remember the council at any time having lights placed in Burkhart Alley?

(Testimony of W. L. Smith.)

A. I couldn't say as to that. I remember something about the lights but I don't remember exactly whether they had them put in the Burkhart Alley or not.

Q. Do you remember the lamp-post being changed on Second Street from the position it occupied about 50 feet north of Burkhart Alley to a position opposite Burkhart Alley?

A. I remember something about that lamp-post; yes.

Q. Why was it placed there?

Mr. GRAHAM.—We object as not proper cross-examination and it doesn't appear that Mr. Smith was on the council that year.

The COURT.—It is not cross-examination; objection sustained.

Q. You were on the council in November, 1916?

A. Yes, sir. [231—192]

Q. Reading to you, under date of November 6, 1916, which appears on page 437 in Book One of the minutes of the City Council of the town of Corrova, as follows: It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired. Do you remember that transaction?

A. It might have happened, yes; but I don't remember exactly the time.

Witness excused. [232—193]

Testimony of Bartley Howard, for Defendants.

BARTLEY HOWARD, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. MEDLEY.)

Q. State your name and residence.

A. Bartley Howard; Cordova, Alaska.

Q. How long have you lived in Cordova?

A. Since February 21, 1909.

Q. You have lived here continuously since then?

A. I have.

Q. Have you served on the Common Council?

A. I have.

Q. How many times? A. Four years.

Q. Four terms?

A. Four years—one year each term.

Q. Have you been chairman of the street committee?

A. I couldn't say positively that I have; I have served on the street committee—I couldn't say I have been chairman of the street committee.

Q. Have you ever been mayor of the town?

A. Acting mayor.

Q. How many terms? A. Part of one term.

Q. Were you on the Common Council in 1912?

A. I was; that was my first year.

Q. June 3, 1912? A. Yes.

Q. There has been read into the record here, October 21, 1912, the following extract from the min-

(Testimony of Bartley Howard.)

utes of the City Council: Notice was given that a street light was wanted in the alley at the intersection [233—194] of Burkhart Way and at various other points. Do you remember anything about that transaction? A. I do; yes, sir.

Q. I will state for your information that Mr. O'Neill testified yesterday in this matter—did you hear his testimony? A. I did.

Q. Mr. O'Neill said that he appeared before the council and requested this light? A. He did.

Q. Do you remember that? A. I do.

Q. Do you remember what was said about the light at that time?

A. Practically the conversation that we had; yes.

Q. Tell the Court what Mr. O'Neill said when he requested this light at the intersection of Burkhart Alley and the regular alley?

A. Mr. O'Neill appeared before the council and asked—

Mr. DONOHUE.—If this is intended as an impeaching question I object to it on the ground that there was no proper foundation.

Mr. MEDLEY.—It is not impeaching anybody.

Mr. DONOHUE.—If it is an attempt to impeach Mr. O'Neill they should have laid the foundation by an impeaching question.

The COURT.—He may state what was said.

The WITNESS.—(Continuing.) Mr. O'Neill appeared before the council and asked that the council place a light in the public alleyway at the rear end of his building, at that time known as the

(Testimony of Bartley Howard.)

Burkhart Alley, and stated his reasons, along this line—that they maintained lights in the alleyway opposite their buildings, between their building and the bank and they felt that it would be the duty of the council to this effect,—to maintain the light at the end of the alleyway, as they allowed the public to travel that alleyway [234—195] without any objection and for the benefit of the Fire Department, that they might operate in case of fire up and down the regular alley of the City of Cordova or through the alleyway of the Burkhart Alley.

Q. What do you mean by saying that they maintained lights in the alley?

A. Slater and O'Neill.

Q. The owners of the buildings there?

A. Yes. The council authorized the committee on fire protection, light and water, to place a light there and they placed it on an iron bracket on the rear end of the building over the alleyway, over the main alleyway of the City of Cordova and the Burkhart Alley.

Q. Over the public alleyway? A. Yes, sir.

Q. Over the fourteen foot alley?

A. Yes, sir; over the 14 foot alley.

Q. It extended down into that alley?

A. It extended out in the neighborhood of two feet, far enough for the ice not to interfere with it, and later it was authorized to be put underneath the alley to protect the globes, the ice was breaking it down, running down there and freezing on it.

Q. Where is the light now?

(Testimony of Bartley Howard.)

A. The light is in the center of the building, between the two buildings there, about 18 inches or two feet inside the alleyway.

Q. Underneath the roof of the alley?

A. Yes, sir.

Q. Do you know why it was put there?

A. For the protection of the light, to keep the ice from breaking it off at the rear end of the building. [235—196]

Q. Have you ever noticed any obstructions in the Burkhart Alley on the part occupied by Lots 7 and 8 in Block 7?

A. I don't know as I understand what you mean by obstructions—that there was anything in the way of the traveling public?

Q. Referring to those portions of Lots 7 and 8 in Block 7, which had been traveled by people using Burkhart Alley—have you seen any obstructions in that alley, placed there by the owners of those buildings? A. I have.

Q. What were they?

A. Well, if I remember right, in 1913, in the spring of 1913 when Slater & O'Neill had taken possession of that building or Reidy & MacDonald, during that winter Reidy & MacDonald maintained a small coal-box at the right of the alleyway going in from the rear end, right under the window just inside the door that enters the stairway; at that time and at different times I have seen freight and stuff in there. During December, 1917, Mr. Harwood had stored in that alleyway some 24 kegs of

(Testimony of Bartley Howard.)

near beer that were shipped here for the coming season, as liquor was going out and his license expired and this beer stood there for some time and froze and the kegs opened up and it ran over the sidewalk, and it was there for some week or ten days or two weeks, I judge, under protest.

Q. Did you see anything else in that alley?

A. During the time I replaced the sidewalk in front of the building I had the lumber hauled up there and stacked in the alleyway, out of the weather. It was a Sunday job, supposed to be done on Sunday, and if I shouldn't do it the following Sunday I would have left it there until the next Sunday. Also when Van Vechten put in his showcases, display counters, there, the freight was hauled up there. [236—197]

Q. Who was Van Vechten?

A. He occupied the building that the Cordova Drugstore occupies now, and he had his freight hauled up, and it stood in the alleyway and it obstructed the biggest part of the alleyway and was there for approximately 24 or 36 hours. We opened up the freight and set the boxes up in the evening—it was put in there out of the weather.

Q. Do you know who repaired and maintained the sidewalk on First Avenue in front of the Burkhart Alley?

A. I have repaired it there for the property owners.

Q. Who paid you for the work?

A. Slater & Burkhart.

(Testimony of Bartley Howard.)

Q. Do you know who maintains and repairs the sidewalks in the town of Cordova where there is a regular alley, regular public alleys, running north and south through the block, acrossed the sidewalk? A. The city of Cordova.

Q. Are you familiar with the extent of travel that has passed through the alley?

A. In a general way.

Q. Give your opinion as to how the travel in the alley compared with the travel that went up B and C Streets when the postoffice was in the Ostrander Building.

A. At that time, it was more or less similar, I should judge.

Q. About the same?

A. Yes, I should judge so.

Q. What would you say about it now, with the postoffice on First Avenue?

A. Nothing to compare with it at all.

Q. What street, which has the most travel, B and C Streets, or the alley? [237—198]

A. B and C. Streets, in my opinion.

Q. Now, Mr. Howard, were you one of the Common Council on December 10, 1917?

A. Yes, sir.

Mr. MEDLEY.—I offer in evidence for the purpose of continuing Mr. Howard's testimony an extract of some minutes of the meeting of the Common Council, certified by the Town Clerk of Cordova.

Mr. DONOHOE.—To which we object on the

(Testimony of Bartley Howard.)

ground that it is not the best evidence.

The COURT.—What is the purpose of the offer?

Mr. MEDLEY.—I want to show that the Council did not consider Burkhart Alley a public alley in 1917, and have Mr. Howard, who was then a member of the Common Council, explain the reference in the minutes to the raising of the assessment on Lots 7 and 8 in Block 7.

The COURT.—Of course, the objection that it is not the best evidence is a good objection, unless you show that the best evidence is not obtainable.

Mr. DONOHOE.—I will withdraw my objection and object to the introduction of it on other grounds,—on the ground that it is incompetent, irrelevant and immaterial—I withdraw my objection on the ground that it is not the best evidence.

The COURT.—What is the purpose of it now, Mr. Medley?

Mr. MEDLEY.—These are the minutes of the Board of Equalization, which the Court undoubtedly knows is the City Council, composed of members of the City Council, sitting as a Board of Equalization on the assessment-roll. This is an official statement, taken from the records, which shows that there was a discussion over the assessment on Lots 7 and 8 Block 7; that certain motions [238—199] were made to raise the assessment. I want to prove by Mr. Howard that the Council at the time those motions were considered, considered Burkhart Alley a private way, in determining these motions and settling the question.

(Testimony of Bartley Howard.)

The COURT.—I fail to see how that binds either of the parties—what the Council considered.

Mr. MEDLEY.—If the Court is of the opinion that the records of the town of Cordova have no bearing on this question, I am satisfied.

The COURT.—No, the Court has not expressed any idea like that, but what I intended to convey to you is this, that what the Council would do about what they thought the property was worth, I don't see how that has any bearing on the issues in this case, or is binding on either the plaintiff or defendant.

Mr. MEDLEY.—I will explain my theory of it to the Court: If the Council in determining the value of property had to determine whether the Burkhart Alley was a private way or public way, wouldn't it be important to the issues in this case what the officials, the representatives of the town of Cordova, did with respect to that alley being a public way?

The COURT.—What they did with respect to its being a public way, in exercising some dominion or control of it, but it seems to me we are building up a record that it is not very material; however, if you desire to introduce it, you may do so.

The extract of the minutes referred to is admitted in evidence, marked Defendants' Exhibit No. 7, and reads as follows: [239—200]

Defendants' Exhibit No. 7.**COPY OF THE MINUTES OF THE BOARD
OF EQUALIZATION HELD DECEMBER
10, 1917.**

On motion duly made and seconded it was voted to reduce the personal property assessment of James Smith on Lot 1 to \$300.00.

It was voted to raise the assessment on the real property situated on Lot 7 in Block 7—H. A. Slater, to \$6,000.00. The same motion was passed in regard to Lot 8, Block 7, assessed to Robert Ashland. At the request of Mr. Hillery, vice-president of the Bank of Alaska, Lot 8, Block 7 was assessed to the Bank of Alaska, which had purchased it from said Ashland.

Mr. Brock, representing the First Bank of Cordova, presented an affidavit stating that the total valuation of the property of said bank was \$25,000 capital and \$5,000.00 surplus, that \$12,500.00 of the capital had been invested in a bank building on Lot 29, Block 2 and that \$2,500.00 of the surplus had also been invested in said building. It was voted to assess said building at \$14,000.00 and the residue of the capital stock at \$16,000.00.

Mr. Hillery, representing the Bank of Alaska, put in an affidavit concerning the total property owned by said bank in Cordova. On motion it was voted to assess the building on Lot 8, Block 7, owned by said Bank at \$6,000.00 and to assess the residue of the capital at \$16,400.00.

It was moved by W. L. Smith to raise the valuation of Lot 7 in Block 7 to \$7,500.00. It was voted to excuse Mr. Capers from the Board to give legal advice on the Smith motion as the Board has previously raised this property from \$5,000.00 to \$6,000.00. Mr. Capers stated that a motion already carried can be reconsidered only by some one who voted in the affirmative on the previous motion. Mr. Smith having voted in the negative on the previous motion, the chair declared the motion out of order. It was voted on the new motion that the previous vote raising the assessment on lots 7 and 8 be reconsidered. Mr. Smith moved that each lot be assessed at \$7,500.00. Mr. Howard moved an amendment to substitute \$6,000.00 for the \$7,500.00. The amendment was carried.

M. Brock as agent of Estelle Blum filed an affidavit with the Board that the property on Lots 1, 2 and 3 of Block 15 was worth \$5,000.00 and was being assessed at \$6,500.00. It was voted to reduce the assessment to \$5,000.00.

W. H. Chase filed an affidavit stating that his personal property on Lot 22, Block 2, was worth \$1,000.00. It being assessed at \$1,500, it was voted to reduce the assessment to \$1,000.00.

No further matters appearing for the consideration of the Board, on motion duly made and seconded it was voted to adjourn *sine die*.

EDWARD F. MEDLEY,
Clerk.

W. H. CHASE,
Mayor.

(Testimony of Bartley Howard.)

United States of America,
Territory of Alaska,
Town of Cordova,—ss.

I, K. G. Robinson, the duly elected, qualified and acting Town Clerk in and for the Town of Cordova, Territory of Alaska, do hereby certify that the above and foregoing is a true and correct transcript of that portion of the proceedings of the Board of Equalization of the Town of Cordova appearing upon page 478 of the minute-book of said Board of Equalization, which said Board of Equalization consists of the members of the Town Council of Cordova in session for that purpose.

Given under my hand and the seal of said town, this 9th day of December, 1919.

(Seal of Town of Cordova.)

K. G. ROBINSON,
Town Clerk, Town of Cordova. [240—200½]

Q. I call your attention to Plaintiffs' Exhibit No. 7, part of which reads as follows:

(Mr. Medley reads the portions of Defendants' Exhibit No. 7, just entered in full in the record, that refer to the assessment on Lots 7 and 8, Block 7.)

Do you recall such a meeting of the Board of Equalization, you being present? A. I do.

Q. I wish you would explain what was done and said by the members of the Council—what was said by the members of the Council at that time in regard to raising the assessors' assessment on Lots

(Testimony of Bartley Howard.)

7 and 8, Block 7, from \$6,000 to \$7,500?

Mr. DONOHOE.—*We* which we object on the ground that it is incompetent, irrelevant and immaterial and has no bearing on the case.

The COURT.—The objection will be sustained; you have introduced the record which shows the official action—the matter of how they arrived at it is not material.

Defendants allowed an exception to the ruling.

Q. You are familiar with real estate valuations in Cordova? A. To a certain extent.

Q. Do you know where Mr. Lathrop's property is, on Lots 24, 25 and 26 in Block 2?

A. I do.

Q. Will you give your opinion to the Court as to how much that property would be depreciated if Burkhart Alley is closed?

A. I wouldn't think it would be depreciated any.
[241—201]

Q. Do you know of any other alleys in the town of Cordova similar to Burkhart Alley between First Street and the regular Alley in Block 7?

A. Yes, a small alley, further down the street, that is between Tom Davidson's building and Slater's building, known as the Model Cafe.

Q. Is that in Block 7?

A. Yes—it runs from First Street to the alleyway at the rear end.

Q. Does anybody use that alley that wants to?

A. As far as I know.

Q. How wide is that alley?

(Testimony of Bartley Howard.)

A. About four feet.

Q. Is it roofed over? A. It is.

Mr. MEDLEY.—That's all.

Cross-examination.

(By Mr. DONOHOE.)

Q. In regard to that light you testified about that was placed in the alley in 1912—who paid for that light, the city? A. The city.

Q. The city paid for the light? A. Yes, sir.

Q. That was placed there in 1912?

A. In the fall of 1912; yes.

Q. And the light is there yet?

A. Yes, sir; the light is there yet.

Q. And during all that time, the city has paid for it? A. As far as I know they have.

Q. What was the special purpose of putting in that light—was it [242—202] not for the purpose of lighting Burkhart Alley?

A. Not altogether; the question was discussed in regard to lighting the rear of the alleyway, both ways, for the fire department, in case of fire.

Q. Do you know of any other place in the regularly laid out alleys where they maintain lights, where the city maintains lights?

A. No, I don't know that I do—there is a light at this particular time, we were requested to place a light at the end of what is known as Waterfront Street, I believe—it is not a full street there, full width, and to change a couple of lights or one light at the rear end of Mr. Lathrop's building, somewhere in there on the sidewalk—we maintained a

(Testimony of Bartley Howard.)

light in the middle of that block.

Q. It is a street?

A. Yes, it's a street; it is dedicated as a street, not as an alleyway.

Q. Do you think the City Council would have placed that light there in 1912 if it wasn't for the purpose of lighting Burkhart Alley?

A. I think if the same request was made by an individual or by the fire chief, coming before the Council and asking that a light be placed there, that the Council would consider something of that kind, for the protection of the property owners; it has been the intention of the property owners to do so.

Q. You want to be understood as testifying at this time that the light would have been put there if there had not been a Burkhart Alley to light up?

A. I would say that I have my doubts if there would have been a request made for it, and the City Council would not have taken action.

Q. You say Mr. O'Neill appeared before the Council? [243—203] A. Yes, sir.

Q. And the reason the city put in this light, he requested, he stated to the Council that he already had one end of the Burkhart Alley lighted?

A. Yes, sir.

Q. And he wanted the city to light the other end?

A. He wanted a light over the alleyway, yes—the Burkhart Alley and the regular alley.

Q. Did Mr. O'Neill say that he wanted the reg-

(Testimony of Bartley Howard.)

ular alley lighted for the fire department?

A. To get through that alleyway, he contended it was necessary.

Q. During the time you were on the Council, the Burkhart Alley was kept generally clear of stuff, so the fire apparatus could get through there?

A. As a general rule it was, not at all times.

Q. Those obstructions you spoke of were temporary in their nature?

A. Yes, sir; only temporary.

Q. Sometimes they pile stuff right out on the sidewalks,—you have seen that? A. Yes, sir.

A. And it might have remained a little longer in this alley because it was covered over?

A. Yes, sir.

Q. How long were you on the Council?

A. Four terms.

Q. Were you there in 1916? A. Yes, sir. ?

Q. Were you a member of the Council—did you attend the meeting on November 6, 1916?

A. I imagine I did; I never missed a meeting while I was a member. [244—204]

Q. I will read an extract from page 437 of Book One of the minutes of the Town Council of Cordova, as follows: It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired. Do you remember of that action? A. Yes, sir.

Q. That action took place in the Council?

A. Yes, sir.

Q. And do you know if the owners were in-

(Testimony of H. A. Slater.)

structed to repair in pursuance of that resolution?

A. If I am not mistaken I notified Mr. Burkhart myself at the request of the street committee—it was his sidewalk in front of the alleyway on Second Avenue that was sloping toward the street, very steep and dangerous, and I notified Mr. Burkhart the next morning to raise it up.

(By Mr. MEDLEY.)

Q. This coal-box, was it a temporary obstruction or a permanent obstruction?

A. It was permanent while it was there. It was placed in the alleyway—it was movable.

The COURT.—It was a coal-box that could be removed? A. Yes, sir.

Q. How large was it?

A. If my memory serves me right, it was about two feet wide and something like 6 feet long, set out from the wall, about so high, about two feet high.

Q. Two feet wide, and six feet long?

A. Yes, sir.

Q. And the other stuff—

A. I happened to have occasion to go through there and noticed it [245—205] there on a few occasions, especially when Mr. Lund was changing the fronts for Mr. Slater and Mr. O'Neill, remodeling the building on the alleyway side.

(By Mr. DONOHOE.)

Q. How often did you see that box there?

A. I would say as often as I went through the alleyway during that winter—that is the only win-

(Testimony of H. A. Slater.)

ter I remember anything of the kind being maintained in there, except another time there was a small box on the other side maintained the same way, where they kept a small supply of coal.

The COURT.—All the obstructions you saw in there didn't prevent you going through?

A. Not at all. It was for the convenience of the occupants in the building.

Witness excused.

Whereupon court adjourned until to-morrow (Saturday) morning at 10 o'clock. [246—206]

Saturday, December 13, 1919.

MORNING SESSION.

Testimony of H. A. Slater, in His Own Behalf (Recalled).

H. A. SLATER, one of the defendants, recalled.
(By Mr. MEDLEY.)

Q. Mr. Slater, state whether or not there is an awning in front of that building on Lot 7, Block 7.

A. There is an awning goes across from Lot 7 to Lot 8, takes in the alley, also goes right straight acrossed, one awning.

Q. An awning paid for by the property owners?

A. Yes, sir.

Q. Fronting the alley on First Street?

A. Yes, sir.

Q. How long has that alley been up there?

A. It was put up shortly after Mr. O'Neill and I came in there.

Q. In 1912? A. In 1912 or 13.

(Testimony of H. A. Slater.)

Q. And has been used continuously ever since?

A. Yes, sir.

(By Mr. DONOHOE.)

Q. How high is that awning above the sidewalk on First Street?

A. I don't know just how high it is.

Q. Nine or ten feet?

A. Something like that.

Q. And a portion of the time it is pushing back against the wall of the building? A. Yes, sir.

Q. And when in position it in no way interferes with the sidewalk or foot travel going through Burkhart Alley? A. No, sir.

Witness excused. [247—207]

Mr. MEDLEY.—We offer in evidence this certified extract of the minutes of the Common Council of the town of Cordova.

Mr. DONOHOE.—The defendant objects to it on the ground that it is incompetent, irrelevant and immaterial. The offer seems to cover some action that took place in the Council since this suit was brought, in which Mr. Lathrop moved that the city clerk be instructed to intervene in behalf of the city in this case. There was no second to the motion and it was lost. I don't see how that has any bearing whatever upon this case.

The COURT.—What is the purpose of it?

Mr. MEDLEY.—The purpose is to show that the City Council has not accepted the alley in any way. I understand that one of the theories of the plaintiffs is that this alley may become a street in three

ways, by an express dedication or by a common-law dedication or by a proscriptive use. In all processes of dedication there must be an acceptance by the city and this is evidence that the city did not accept any dedication, common law or express.

The COURT.—The offer will be denied.

To which ruling of the Court counsel for defendants is allowed an *acceptance*.

DEFENDANTS REST.

Mr. DONOHOE.—The plaintiffs move to reopen their case for the purpose of introducing the deposition of M. Finklestein, a witness whose testimony was taken by the defendants and has not been introduced and also to put in the testimony of two short witnesses. Part of the evidence may be rebuttal or it may be in the main case—I don't know how the Court will look upon it.

Mr. GRAHAM.—We object to the case being reopened for the purpose of putting in testimony, the purpose of which is not apparent [248—208] and not made known to the Court. As far as the deposition is concerned, we have no objection to the reopening of the case for that purpose, but as to witnesses entering upon a line of testimony which may or may not be rebuttal, I do not think the case should be opened for that purpose.

Mr. DONOHOE.—The testimony of these witnesses is this: To show that the regular alley running north and south through Block 7 is not planked and is not fit to be used for foot-passengers and is not so used by pedestrians and for four or five months of the year it is blocked with snow so that

it cannot be used by pedestrians for travel. The reason we did not offer this testimony before is this: To the original complaint the defendants filed a demurrer that it did not state facts sufficient to constitute a cause of action. We amended our complaint and alleged specific acts of damage and the defendant did not move against those acts but denied them and we naturally believed that that issue was left on the pleadings, but since the case has taken the turn it has, we desire to show that this plaintiff Alice Johnson has no egress by means of the regular alley and we want to put witnesses on the stand to clear up that issue.

The COURT.—I think you should be confined to rebuttal. The motion to reopen the case for the purpose of putting in the deposition is granted.

Plaintiffs allowed an exception to the ruling.

Mr. DONOHOE.—I will now offer the deposition of Mr. Finklestein. [249—209]

Mr. DIMOND.—I will now read the deposition of Mr. Finkelstein.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA,
Defendants.

Stipulation Re Deposition of M. Finkelstein.

It is hereby stipulated and agreed by and between the parties, plaintiffs and defendants, in the above-entitled action, by and *and* through their respective attorneys of record, that the deposition of M. Finkelstein, a witness upon behalf of defendants, may be taken upon written, direct and cross-interrogatories to be propounded to said witness at the time of taking said deposition, by the officer before whom said deposition may be taken; that said deposition may be taken before any person authorized under the laws of the State of Washington to take depositions, at such time or times as such person may fix therefor, provided said deposition shall be taken not later than October 15, 1919, and immediately mailed to the clerk of the District Court, Cordova, Alaska.

It is further stipulated that said deposition when taken and reduced to writing and certified by said notary public or person authorized to take depositions and filed in the court may be read by either parties in evidence at the trial of the above-entitled cause, or at any retrial thereof, with the same force and effect as if said witness appeared at said trial in person and orally testified.

It is further stipulated that each of the parties reserve all legal objections to the testimony given by said witness and all objections to the form of the interrogatory or cross-interrogatory and may interpose any and all legal objections to said testimony and to the competency, relevancy and mate-

riality of any direct interrogatory or cross-interrogatory or any answer thereto at the time the said deposition is offered in evidence, whether said objections appear from said deposition to have been made at the time of the taking of the same or not.

It is further stipulated and agreed that all objections as to the manner of certifying said deposition and transmitting same to the clerk of the Court is hereby waived so long as it appears from said deposition and the certificate of the notary, or person authorized to take depositions, attached thereto, that the witness was duly sworn before testifying and that the testimony contained in said deposition was given by said witness in accordance with this stipulation.

Dated at Cordova, Alaska, this 7th day of October, A. D. 1919.

DONOHOE & DIMOND,
By T. J. DONOHOE,
Attorneys for Plaintiffs.
EDWARD F. MEDLEY,
B. O. GRAHAM,
Attorneys for Defendants. [250—210]

Deposition of M. Finkelstein, for Defendants.

BE IT REMEMBERED, that pursuant to the stipulation hereto annexed, and on the 14th day of October, 1919, at the hour of two o'clock P. M. of said day, at the office of Lyons & Orton, in the Alaska Building, Seattle, Washington, before me, Thomas R. Lyons, a notary public in and for the State of Washington, duly appointed and commissioned to administer oaths, personally came M.

(Deposition of M. Finkelstein.)

Finkelstein, a witness produced on behalf of the defendants in the above-entitled action, who being by me first duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, then and there testified and answered the hereto attached interrogatories and cross-interrogatories as follows:

Direct Interrogatories.

Int. No. 1. State your name, age and residence.

A. M. Finkelstein; age, 53; I call Cordova my home, but I am there six months and here six months.

Int. No. 2. State whether or not you are now or ever have been a resident of the town of Cordova, Alaska; and if you state that you are now or ever have been a resident of said town, state between what years you lived in said town.

A. Yes, I have been a resident of the town of Cordova, Alaska; I have lived there since 1907. I have been out of there, in the States, several times on business trips and visits, but my business and home were in Cordova, Alaska, during all of this time.

Int. No. 3. State whether or not you ever were the owner of Lot 26 in Block 7 of the town of Cordova, Alaska; and if your answer is in the affirmative, state when and from whom you purchased said lot.

A. Yes, I was the owner; I purchased it from the Cordova Townsite Company, from the trustee of the townsite of Cordova. [251—211]

Int. No. 4. State whether or not, during the time

(Deposition of M. Finkelstein.)

you were the owner of Lot 26, in said Block 7, a building was erected on Lot 7 in said Block 7; and if you answer this question in the affirmative, state when and by whom such building was erected.

A. Well, there was no building there at the time I purchased my lot No. 26, but during the time that I owned Lot 26, there was a building erected on Lot 7, Block 7, by Robert Ashland.

Int. No. 5. State whether or not you know that a building was erected on Lot 8 of said Block 7, adjoining said lot 7 on the south; and if your answer is in the affirmative, state when and by whom the building on said Lot 8 was erected?

A. Well, I do not know just who built those buildings; I know Mr. Burkhart was one of them; I think it was Mr. Burkhart and Mr. Barber—but I am not sure.

Int. No. 6. State whether or not the buildings erected on said Lots 7 and 8 were so constructed, when erected, that the buildings on said lots joined at the dividing line between said lots?

A. They joined at the second story—there was a space between the buildings at the first story, but they joined at the second story.

Int. No. 7. If your answer to the preceding question is in the affirmative, state whether or not a hall-way between the buildings on said Lots 7 and 8 was left on the ground floor at the time said buildings were erected. A. Yes, sir.

Int. No. 8. If you have stated that such a hall-way was made when said buildings were erected,

(Deposition of M. Finkelstein.)

state the approximate width and height of said hallway, and how much each of said lots 7 and 8 was occupied by said hallway.

A. The hallway was about eight feet wide and about twelve feet high, and about four feet of each lot was occupied by such hallway. [252—212]

Int. No. 9. State whether or not you know who the owners were of Lot 25 in Block 7 and Lots 7 and 8 in said block at the time the buildings were erected on said lots 7 and 8. For your guidance in answering this question you are informed that Lot 26, Block 7, is in the rear of Lot 7, Block 7, but facing on Second Avenue, while said Lots 7 and 8 in Block 7, face on First Avenue of said town of Cordova.

A. Yes, I know the owners.

Int. No. 10. If your answer to the preceding question is in the affirmative, state who were the owners of Lot 25 in Block 7 and Lots 7 and 8 in said block, at the time the buildings were erected on said Lots 7 and 8.

A. Well, Lot 25 and Lot 8 belonged to Burkhart and Barber together, and lot 7 belonged to Robert Ashland.

Int. No. 11. The plaintiffs in the above-entitled case, in Paragraph VI of their Amended Complaint, allege:

“That in the summer of the year 1908 Lot No. 7 in Block No. 7 of the said Town of Cordova was owned by Robert Ashland; Lot No. 8 in Block No. 7 was owned by A. E. Burkhart; Lot No. 25 in Block No. 7 was

(Deposition of M. Finkelstein.)

owned by A. E. Burkhart; Lot No. 26 in Block No. 7 was owned by M. Finkelstein. That at said time the owners of said lots were about to erect buildings on their respective lots and they then and there orally agreed to open an alley eight feet wide from First Street to Second Street in said Town of Cordova, the centre of said alley running along the dividing line between Lots Nos. 7 and 8 and Lots No. 25 and 26 in Block 7 of the said Town of Cordova. That the then owners of Lot 7 and Lot 26 in Block 7 gave four feet of their said lots along the southerly side thereof for said alley and the then owners of Lots 8 and 25 of said Block 7 gave four feet along the northerly side of their said lots for said alley. That said alley thereupon became known and ever since has been known and called Burkhart Alley. That shortly after said agreement the owners of the said four lots, heretofore described, erected buildings on their said respective lots, the side walls of said buildings being four feet from the side line of said lots, thus leaving a public way eight feet wide from First Street to Second Street; that when the owners of said lots erected buildings on their respective lots, they made various and many entrances into said buildings from Burkhart Alley and in all manner treated said Burkhart Alley as a [253—213] public highway. At the time said alley was opened up it was agreed between the owners of said four lots

(Deposition of M. Finkelstein.)

that the four foot strip given by A. E. Burkhardt for said alley along the northerly side of Lot 25, about 18 inches thereof should be used for the walk following the grade of the alley, and the remaining $21\frac{1}{2}$ feet should be used for higher walks not following the grade of the alley but on the levels of the floors of the buildings erected on said Lot 25 so that the occupants in the apartments of said buildings might conveniently reach the same from said alley."

State whether or not any conversation was had between the owners of said four lots, at or prior to the time said buildings were erected, concerning the manner in which said buildings should be constructed.

A. Yes, we had some conversation about the matter.

Int. No. 12. If in answering the last question you have stated that there was any conversation between the owners of said four lots at or prior to the construction of said buildings, state who was present during such conversation when said conversation occurred, as nearly as you can determine, and what was said by the owners of said four lots concerning the manner in which said buildings should be erected.

A. We all had an understanding that the buildings should be so erected as to leave an eight-foot alleyway—that there should be such an alleyway between the buildings for our use. I do not now recall the details of the conversation, but the sub-

(Deposition of M. Finkelstein.)

stance of it I have stated. I do not remember who was present at such conversation.

Int. No. 13. State whether or not, at or prior to the time said buildings were erected, there was ever any conversation between the owners of said four lots, relative to opening an alley eight feet wide from First Street to Second Street in said town of Cordova, with the centre of said alley running along the dividing line between Lots 7 and 8 and between Lots 25 and 26 in Block 7 of [254—214] said town of Cordova, and if your answer is in the affirmative, state what was said and by whom.

A. Yes, there was something said, but I do not now remember what arrangements were made, but such conversation amounted to an agreement between all of the owners of said lots that an alleyway would be extended from First to Second Avenues along the dividing line between Lots 7 and 8 and between Lots 25 and 26, in Block 7, but it is now impossible for me to state just what each party or any of the parties said.

Int. No. 14. State whether or not, at or prior to the time said buildings were erected, there was ever any conversation between the owners of said four lots, relative to the owners of Lot 7 and Lot 26 in said Block 7 giving four feet of their said lots along the southerly side thereof for such alley, or the then owners of Lots 8 and 25 in said block giving four feet along the northerly side of their said lots for said alley, and if your answer is in the affirmative, state what was said and by whom, and who was present at the time.

(Deposition of M. Finkelstein.)

A. Yes, there was an understanding that there should be an alleyway left between the buildings and that each party should give up about four feet for such alleyway. I do not remember who was present, and I do not remember the details of the conversation.

Int. No. 15. State whether or not, at or prior to the time said buildings were erected, there was over any conversation between the owners of said four lots relative to A. E. Burkhart leaving about eighteen (18) inches of the northerly four feet of said Lot 25 to be used for a walk following the grade of said so-called alley, and the remaining two and one-half ($2\frac{1}{2}$) [255—215] feet of the northerly four feet of said Lot 25 being used for higher walks not following the grade of said so-called alley, but on the levels of the floors of said buildings erected on said Lot 25 to enable the occupants of the apartments of such building to reach the same from said so-called alley; and, if your answer is in the affirmative, state what was said and by whom, and who was present at the time.

A. I do not remember anything about that at all.

Int. No. 16. State whether or not at any time when you were the owner of said Lot 26, Block 7, there was ever any conversations between the owners of said four lots, or any of them, at which you were present, relative to making said so-called Burkhart Alley a public highway, or a public alley, street or thoroughfare; and if your answer is in the affirmative, state what was said, by whom, who was

(Deposition of M. Finkelstein.)

present at the time, and approximately at what time said conversation occurred.

A. Positively not; it was not for a public alley-way at all, but strictly for our own convenience, to get to our buildings more easily.

Int. No. 17. State whether or not, at the time you erected the building on said Lot 26, Block 7, you intended to dedicate the four feet of the south-erly side of said lot to the public use as a highway.

A. No, I did not.

Int. No. 18. State whether or not, at the time you erected the building on said Lot 26, Block 7, you intended to retain control, dominion and pos-session of the southerly four feet of said lot.

A. Yes, I did.

Int. No. 19. State whether or not any conversa-tion was had between [256—216] the then owners of said four lots at or prior to the time of the erec-tion of the said buildings thereon, relative to the right of any or all of the owners of said four lots to close or otherwise prevent the use of their respec-tive portion of said so-called alley?

A. Yes, there was something said about it.

Int. No. 20. If you answered the last interroga-tory in the affirmative, state when such conversation occurred; as near as you can determine the time, who was present, and what was said and by whom.

A. I do not remember who was present, but we were all together at the time—it was in the spring of 1908. Well, we agreed to close the alley any time we saw fit. That was the understanding. The

(Deposition of M. Finkelstein.)

alley was simply for our own convenience, and we could close it if we wanted to.

Int. No. 21. State whether the plank foot-walk crossing the regular alley running north and south through said block and which connects that part of the so-called Burkhart Alley between said Lots 7 and 8 and that part thereof between Lots 25 and 26 was constructed or maintained by the town of Cordova or by the owners of said lots.

A. By the owners of said lots. The town of Cordova never did anything towards the maintaining of the alleyway as long as I owned the building—the owners of the buildings kept up the alleyway.

Cross-interrogatories.

Cross-Int. No. 1. Do you at this time own Lot 26, Lot 25, Lot 7 or Lot 8, in Block 7, of the town of Cordova, Alaska, or any interest in said lots or either of them. [257—217]

A. No.

Cross-Int. No. 2. State when you erected the building on Lot 26 in Block 7, of the Town of Cordova, Alaska.

A. In the spring of 1908.

Cross-Int. No. 3. Did you commence your residence in the Town of Cordova, Alaska, in the summer of 1908, and have you been a resident of said place ever since?

A. I commenced my residence in Cordova, Alaska, in 1907, and have lived there ever since.

Cross-Int. No. 4. It is a fact, is it not, that when you erected the building on Lot 26, in Block 7, in 1908,

(Deposition of M. Finkelstein.)

you constructed the south wall of said building four feet north of the south line of said lot, thereby leaving an alleyway four feet wide off the southerly side line of Lot 26, and when Burkhart and Barber erected the building on Lot 25, in Block 7, they constructed the north wall of said building four feet south of the north line of said lot thereby leaving four feet for an alleyway, except as the same was occupied by a high walk along the floor level of this building? A. Yes.

Cross-Int. No. 5. It is a fact, is it not, that when Robert Ashland constructed his building on Lot 7 in Block 7, town of Cordova, Alaska, he constructed the south wall of said building four feet north of the south line of said lot, thereby leaving four feet of the southerly side of said lot for an alleyway and when A. E. Burkhart constructed the building on Lot 8 in Block 7, he constructed the north wall of his building four feet south of the north line of said lot, thereby leaving four feet for an alleyway and this made an eight foot alleyway between the buildings on Lot 7 and the building on Lot 8 in Block 7? [258—218]

A. Yes.

Cross-Int. No. 6. It is a fact, is it not, that in 1908, after the buildings had been erected on the four lots bordering on Burkhart Alley, there was an open alley eight feet wide, excepting that part occupied by a high walk along the building on Lot 25, from First Street to Second *Second*, through and over which the general public traveled every day? A. Yes.

Cross-Int. No. 7. It is a fact, is it not, that from

(Deposition of M. Finkelstein.)

the time Burkhart Alley was opened up for public travel in the year 1908, until defendant Slater closed a portion of it in September, 1919, this alley was continuously used as a public street or alley and the general public passed through and over it without permission from anyone and without anyone attempting to hinder them in any manner from so using it?

A. Yes.

Cross-Int. No. 8. It is a fact, is it not, that during the time you were the owner of Lot 26 in Block 7, you did not do any act to prevent the general public from the free use of Burkhart Alley as a public street or alley and did not in any manner attempt to prevent it being used as a public highway?

A. It is; I never sought to prevent anyone from using the alleyway as long as I owned the building.

Cross-Int. No. 9. It is a fact, is it not, that when you commenced business in the building on Lot 26 in Block 7, and during all the time you were engaged in business there, you considered it an advantage to have Burkhart Alley open as a public highway and to have the public use it freely as a highway?

A. Yes.

Cross-Int. No. 10. Did you not in the town of Cordova, Alaska, in [259—219] the month of September, 1919, have a conversation with T. J. Donohoe, one of the attorneys for plaintiff in this action, regarding Burkhart Alley, in which you stated to the said Donohoe that there was no written agreement between the owners of the four lots bordering on Burkhart Alley in regard to whether the same should be a

(Deposition of M. Finkelstein.)

public thoroughfare or not and in this conversation in response to a question asked you by the said Donohoe regarding any oral agreement the said owners made at the time of opening up said Burkhart Alley, did you not state, "I cannot remember what the oral agreement was; it was so long ago"?

A. That is right; I think I had such a conversation; I do not remember what the oral agreement was.

Cross-Int. No. 11. If in your direct examination you state that it was agreed between the owners of the said four lots bordering on Burkhart Alley, that any one of the owners of any of said lots might close his portion of said alley at any time he feels fit, I will ask you if it was not agreed that at the time Burkhart Alley was opened up and at the time you built your building on Lot 26 in Block 7, that Burkhart Alley could not be closed nor any part of it closed to the public except by the consent of all the owners of the four lots bordering on said alley?

A. I do not remember any such understanding.

Cross-Int. No.12. If this was not the agreement, what advantage would you gain for the four feet along the southerly line of Lot 26, which you left for an alleyway?

A. Well, we just simply gained by getting to our buildings more easily than by going around the block; that is what we gained.

Cross-Int. No. 13. Would Burkhart Alley be of any advantage to a business conducted on Lot 26 or on Lot 25 of Block 7, if the westerly end of said alley was closed where it passes over Lot 7. [260—220] and Lot 8, in Block 7? A. No, sir.

(Deposition of M. Finkelstein.)

Cross-Int. No. 14. Would you have given four feet off the southerly side of Lot 26, in Block 7, for this alleyway if Burkhart or Ashland had reserved the right to close the alley where the same passes over the southerly four feet of Lot 7 and the northerly portion of Lot 8? A. No, sir.

Cross-Int. No. 15. Was not Burkhart Alley opened up as a public highway in 1908 because you wanted to be on a street corner with your clothing business on Lot 26 and Ashland wanted to be on a street corner with his saloon business on Lot 7 and Burkhart wanted to be on a street corner with his business on Lot 8 and Burkhart also wanted a street or alley running along the Burkhart Apartment in the building on Lot 25?

A. Why, yes, that is why we left the alleyway; we could get to our buildings more easily; it was for our convenience.

(Signed) M. FINKELSTEIN.

State of Washington,
County of King,—ss.

I, Thomas R. Lyons, a notary public in and for the State of Washington, do hereby certify that the witness in the foregoing deposition, named M. Finkelstein, was by me, on the 14th day of October, 1919, sworn to tell the truth, the whole truth and nothing but the truth in said cause, and after being by me duly sworn, the written interrogatories and cross-interrogatories hereto annexed were propounded to him by me, and the answers taken, in accordance with the stipulation to take testimony, hereto annexed; that said answers were

reduced to writing by B. B. Dearborn, a qualified stenographer, and when completed were carefully read by said witness, and being by him corrected, [261—221] were subscribed by him in my presence.

WITNESS my hand and notarial seal this 14th day of October, 1919.

[Notarial Seal] THOMAS R. LYONS,
Notary Public in and for the State of Washington,
Residing at Seattle.

My Commission expires September 22, 1922.

Mr. DONOHOE.—I want to recall Miss Johnson, in rebuttal. [262—222]

REBUTTAL.

Testimony of Alice Johnson, in Her Own Behalf (In Rebuttal).

ALICE JOHNSON, one of the plaintiffs, recalled as a witness in her own behalf, in rebuttal, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. Miss Johnson, you reside, do you not, in the basement portion of the building on Lot 25, in Block 7, of the town of Cordova? A. Yes, sir.

Q. How long have you resided there?

A. About a year and six months.

Q. Have you had occasion since you have resided there to notice the condition of what is termed the regular alley running north and south through Block 7 of the town of Cordova? A. Yes, sir.

Q. That alley separates your building from the building on Lot 8 in Block 7, does it?

(Testimony of Alice Johnson.)

A. Yes, sir.

Q. And separates Lot 26 from Lot 7 in Block 7?

A. Yes.

Q. Is there any sidewalk on that alley?

A. No, sir.

Q. There is no sidewalk leading south towards B Street or north towards C Street? A. No, sir.

Q. Is that alley paved? A. No, sir.

Q. What is the condition of that alley during the winter-time?

A. It is in very bad condition during the winter and in the summer it is bad also.

Q. What is its condition in winter as to snow accumulating in it?

Mr. MEDLEY.—We object to that. [263—223]

Objection overruled; defendants allowed an exception.

A. Well, it is piled very high with snow, so nothing can get through—the teams can hardly get through.

Q. How is that?

A. It is piled with snow during the winter and no one can hardly get through and teams can hardly get through.

Q. Does the pedestrian or foot travel of the town of Cordova use that alley for travel at any time?

A. Very little.

Q. Is it in such a condition that it could be used for public travel or foot-passengers? A. No, sir.

Mr. GRAHAM.—We object as leading and move to strike the answer.

Objection sustained and motion granted.

(Testimony of Alice Johnson.)

Q. What is the condition of that alley in the summer-time as to being used for foot travel?

A. Well, it is used a little but it is usually sloppy and wet in there, in lots of places.

Q. The parties that use the alley at all in the summer-time, how do they reach the alley?

A. Some through the Burkhart Alley and some from this street and some from the other street.

Q. What is the condition of the alley as to whether or not there are obstructions or garbage of any kind in the alley?

Mr. GRAHAM.—We object as improper and immaterial.

The COURT.—Objection sustained.

Mr. DONOHUE.—That's all. [264—224]

Cross-examination.

(By Mr. MEDLEY.)

Q. Do you know whether any of that public alley has been paved? A. Not that I know of.

Q. You don't know of it? A. No, sir.

Q. Have you noticed it lately?

A. I haven't been through the alley lately.

Q. Did you ever look from the direction of your house towards B Street, down the alley, or C Street, when you come out of your house?

A. There is a walk just in the back of the Horse-shoe Building.

Q. Part of it is paved?

A. It is a board walk; yes.

Q. How is it constructed?

A. It is constructed for the teams.

(Testimony of Alice Johnson.)

Q. What do you mean, for the teams?

A. I think it is about a year ago—it was in awful bad shape, and Mr. Finklestein reported it to the City Council and they fixed it the next week.

Q. The city fixed it? A. Yes, sir.

Q. The city made the repairs on the public alley?

A. Yes, sir.

Q. Do you know how much of it they paved?

A. Just in front of the Horseshoe building, that is, in the rear of the Horseshoe building.

Q. And on Mr. Finklestein's building?

A. No, sir.

Q. About 50 feet? A. Just about 50 feet.

[265—225]

Q. Do the teams use that alley all the winter long?

A. All the teams that come through use it.

Q. Does the public scavenger use that alley all winter long with his team? A. Yes, sir.

Q. Doesn't Mr. Finklestein or his firm use the alley that way, their teams, for delivery?

A. Sometimes.

Q. All the year round?

A. Sometimes I don't see them for a week or more.

Q. Now, Miss Johnson, how many people have residences fronting on that alley?

A. I really don't know.

Q. Do you know whether there are any?

A. Yes, I guess there is a few—my part of it is on that alley.

Q. Those people in there would have to use the alley to get in and out of their houses? A. Yes, sir.

(Testimony of Alice Johnson.)

Q. Were you familiar with the alley at the time the postoffice was in the Ostrander Building?

A. Yes, sir.

Q. Do you know whether the city kept the alley free of snow so that mail could be delivered?

A. I don't know.

Q. You are not familiar with that? A. No.

Q. Do you know where the mail was delivered from the boats to the postoffice?

A. I never noticed that.

Q. You don't know whether it was delivered through the alley or not? A. No, sir. [266—226]
(By Mr. DONOHUE.)

Q. This pavement is just planks laid down where there is rather a deep point or coulee?

A. Yes, sir.

Q. Put down to enable *to* teams to go over that coulee? A. Yes, sir.

Q. That is the only pavement in the alley?

A. That is all I noticed.

(By Mr. MEDLEY.)

Q. What is a coulee?

A. It is very low and a very bad place.

Q. Do you understand that there is any open space underneath the planking or the planking is in a roadbed?

A. I judge there is about two feet of space under the planks.

Q. Can you testify there is two feet of space under the planks? A. No.

Q. You don't know? A. I don't know positive.
Witness excused. [267—227]

Testimony of A. E. Lathrop, in His Own Behalf (Recalled in Rebuttal).

A. E. LATHROP, one of the plaintiffs, recalled, as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. I believe you testified in your direct examination that you had been in the transfer business for a number of years in the town of Cordova?

A. Yes, sir.

Q. Commencing what year? A. 1908.

Q. Were you the occupant of the building on Lots 5 and 6 in Block 7 of the town of Cordova for a number of years? A. Yes, sir.

Q. That building abuts, the front of the building, on First Avenue and the rear of the building abuts on the regular alley running north and south through Lot 7, Block 7? A. Yes.

Q. Are you familiar with the regular alley running north and south through Block 7? A. I am.

Q. And have you been familiar with that alley since 1908?

A. Since 1908, up to the time I sold the Transfer Company; I haven't paid much attention to the alley in the last year or two, since I have been here.

Q. You were somewhat familiar with the alley in the vicinity of the rear of the building on Lots 7 and 8 until this summer when you gave up the lease on that property? A. Yes, sir.

Q. Is there any sidewalk through this alley?

(Testimony of A. E. Lathrop.)

A. No, none I know of.

Q. You would know it if there was one? [268—228]

A. I am positive there is no walk unless a short piece of walk leading from Burkhart Alley into the rear door of Harwood's—I don't know of any other walk from the alley.

Q. You don't know that there is such a walk there as that, do you?

A. I think it is an outlet from the back of his building; I know he has a back door; I have never been through there.

Q. Is that a plank walk to get teams over or a sidewalk for foot-passengers?

A. That is for people, not for teams, the walk I am speaking of, that leads from the rear of Harwood's, from his door to the alley.

Q. To the Burkhart Alley? A. Yes, sir.

Q. And it stops at Harwood's back door?

A. Yes.

Q. How far is that from Burkhart Alley?

A. One lot, 25 feet.

Q. Do you know whether the regular alley that runs north and south through Block 7 of the town of Cordova is used by the traveling pedestrians of the town of Cordova as a means of travel—do you know that it is or not?

A. It is not used only by—there are a few cabins, two or three cabins on the side of the alley; those people make use of it. But the traveling public don't use the alley.

(Testimony of A. E. Lathrop.)

Q. How do they get to the alley—those people that travel there?

A. Through the Burkhart Alley and occasionally from the Ostrander end, from C Street.

Q. What is the width of that alley?

A. I think it is 14 feet.

Q. Is the west side of the alley, that is, the side next to First [269—229] Avenue entirely built up with buildings? A. It is.

Q. Most of those buildings are two-story buildings?

A. Most of them are, and run to the alley.

Q. And the buildings extend from the regular alley 100 feet to First Street? A. Yes, sir.

Q. How is the slope of the roof of those buildings? A. All the watersheds are to the alley.

Q. And in time of rain, the rainy season, where is the rain that accumulates on the roof of those buildings deposited?

A. Runs off into the alley.

Q. Is the same true when we have thawing weather in the winter-time? A. Yes, sir.

Q. And what becomes of the snow that accumulates on the roofs of these buildings during the winter-time?

A. It is shoveled off into the alley.

Q. And what condition does that leave the surface of the alley in the winter-time in regard to snow? A. It is impossible to get through.

Mr. GRAHAM.—I move to strike out this testimony in regard to the drains from the roof run-

(Testimony of A. E. Lathrop.)

ning into the alley and snow accumulating in the alley for the reason that it is a public alley and if there is occasion to travel it and have it open, it is the duty of the public of the town of Cordova to keep it open; it is the same as any other alley.

The COURT.—Motion denied and exception allowed. It goes to the question of user of the alley, which is a question here.

Q. Describe the condition of the alley in the winter-time in reference to the amount of snow in that portion of the alley north [270—230] of the Burkhart Alley up to C Street—what is the condition of the snow there?

Mr. GRAHAM.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled; defendants allowed an exception to the ruling.

A. I am speaking now from years of experience—

Mr. MEDLEY.—Answer the question.

The WITNESS.—(Continuing.) Not days but weeks and sometimes months it has been impossible—

Mr. MEDLEY.—I object to this form of answer.

The WITNESS.—(Continuing.) It has been impossible to put teams through there for weeks.

Q. Is that condition quite general during the winter months of each year?

A. Winters we have considerable snow.

Q. When you were occupying the premises on Lots 5 and 6 in Block 7, did you ever have occasion to shovel snow off the roof of that building?

(Testimony of A. E. Lathrop.)

A. Yes, sir.

Q. And where did you deposit that snow?

A. In the alley.

Q. And would that raise the surface of that snow in that alley any higher than it would be back of Clayson's building.

A. Yes, ten or fifteen feet, back of those buildings that extend to the alley. Clayson's building, I believe, is only about 80 feet, which leaves a space to throw the snow off, without throwing it into the alley.

Q. Then it would make, the one much higher and the other places much depressed? [271—231]

A. Yes, sir.

Q. Did you, while you were in the transfer business, have the contract for hauling the United States mails to the postoffice in the Ostrander building? A. Yes, sir.

Q. You remember the question put to Miss Johnson about the alley, and delivering mail to the Ostrander Building—can you describe that situation to the Court?

A. The city never kept any alley open for me to handle the mail and I have handled the mail ever since it was handled in this town.

Q. The Ostrander Building is how far from C Street?

A. The Ostrander Building is 60 feet deep, I believe—60 feet wide and 100 feet deep.

Q. In delivering this mail to the Ostrander Building, how did you travel?

(Testimony of A. E. Lathrop.)

A. I used the vacant space to the rear of Clayson's store and made a turn around there.

Q. How far down the alley did you come from C Street?

A. Came down the full width of the building; that is where I delivered the mail—then I drove beyond the building, in the open there.

Q. How far south on the alley did you travel from C Street when you delivered your mail—in getting your teams out? A. About 100 feet.

Q. Did that take you anywhere close to the Burkhart Alley? A. No.

Mr. GRAHAM.—This is all according to past conditions when the postoffice was in the Ostrander Building; that has nothing to do with whether the alley will be used in the future or not.

Mr. DONOHOE.—I will withdraw the question.

Q. Now, calling your attention to the condition of the alley, from [272—232] Burkhart Alley south to B Street, what would you say as to the condition of that alley in the winter-time, so as to be able to utilize it for pedestrians or foot travel—south from the Burkhart Alley toward B Street?

A. It all depends on the winters—there are many weeks that we are never able to use the alley.

Q. From your experience, do you know the length of Block 7? A. Not offhand; no.

Mr. DONOHOE.—That's all.

Cross-examination.

(By Mr. GRAHAM.)

Q. Teams never travel on Burkhart Alley, east

(Testimony of A. E. Lathrop.)

and west? A. No.

Q. Then that would make no difference, the closing of Burkhart Alley, with reference to the access to Miss Johnson's property by teams?

A. By teams—no.

Q. The only difference would be by foot-passengers? A. By foot-passengers.

Q. For foot-passenger travel, from the rear end of the Burkhart Flats, on to either B or C Streets, it is not possible to make a path through there in the winter-time, so persons could travel?

A. No, it is impossible.

Q. It is no more impossible than in other alleys of the town that are filled up?

Q. You asked if it was impossible. It is not impossible; after there was a great accumulation of garbage we would shovel and haul through the snow there to let a double-ender or snowsled in and get the garbage out. I have delivered coal—
[273—233]

Q. I am speaking of foot-passengers, not team traffic.

A. Well, they could use this road that was used by the garbage-man, after it was shoveled out.

Q. Suppose the garbage-man didn't go in there at all; isn't it practicable for a path to be kept through there so people could walk through, in the winter-time?

A. It is simply impossible to get through that alley in the winter-time, unless you do shovel.

Q. The same would be true in any other alley,

(Testimony of A. E. Lathrop.)

when the snow is deep, wouldn't it?

A. Certainly, only more so in this case.

Q. They have to shovel on Burkhart Alley, that part not covered over with buildings, to get through in the winter-time when heavy snow is falling?

A. Yes, they have to shovel.

Q. It is practicable also for the city, the town of Cordova, to put a walk along this public alley that runs north and south, and put a shed over that walk, isn't it, roof it over, the same as the Burkhart Alley is roofed over?

A. They certainly can do those things; yes.

Q. And they can put it in just as good shape for foot-travel if there is any justification for it, any travel there, in the winter-time, as the Burkhart Alley is now, through those buildings?

A. They can do those things but cities don't do those things in this country.

Q. Does the City Council object to throwing snow into the alley, off your building?

A. They object to throwing snow in the alleys off all the buildings—one council did that. [274—234]

Q. Hasn't the council insisted on keeping that alley open—was there objection on account of fire risk?

A. They *certain* did and that wasn't always done.

Q. Then you maintain that all these property owners have a right to blockade the public streets with snow off of their buildings?

A. No, I don't maintain they have but there must

(Testimony of A. E. Lathrop.)

be a place to dispose of this snow and the alley is the logical place; they can't put it over in the main street and it must go into the alley.

Q. Then you maintain you have the right to blockade the public streets and alleys with snow off of your buildings?

Mr. DONOHUE.—We object to that.

Mr. GRAHAM.—I will withdraw the question.

Q. The reason, then, that this alley running north and south through Block 7 is blockaded in the winter-time is due to the fact that the property owners shovel the snow off the roofs of their buildings into the alley? A. Not altogether.

Q. Very materially?

A. There is no travel, no justification for travel there—to keep this alley open.

Q. There has been no reason in the past why it should be kept open for foot travel?

A. I am talking about teams.

Mr. GRAHAM.—I suggest that we confine ourselves to foot travel because Burkhart Alley has never been used by teams and cannot be used for teams, so we should be confined to foot travel—I want to confine my questions along that line.

Q. A very material portion of the obstruction of that north and south alley has been due to property owners shoveling snow off the roofs of their own buildings into that alley? [275—235]

A. There is no question but that that had a great deal to do with it.

Q. And if it were not for the fact that the

(Testimony of A. E. Lathrop.)

property owners shoveled the snow off of the roofs of their own buildings into that alley, it would be practicable to keep it open?

A. That is a roundabout way to get anywhere.

Q. That is another question. We are getting at the practicability of using that north and south alley for foot-passengers instead of the Burkhart Alley?

A. It is not impossible to use any alley.

Q. I say practicable—it would be practicable to keep it open for foot travel if the property owners were not permitted to shovel the snow off of those buildings into the alley—isn't that a fact?

A. If the property owners were not permitted to shovel snow off the buildings into the alleys there would be no buildings.

Q. Answer the question.

A. That is the only way we can dispose of the snow.

Q. If the property owners were required to haul that snow away after they shoveled it off there—

A. That can be done.

Q. Now, take either supposition you want to—whether the property owners are prohibited from shoveling the snow off of their buildings there or hauling it away after they shoveled it off—is it not practicable to keep that north and south alley in condition for foot travel during the winter?

A. I wouldn't say it is practicable; no.

Q. Why not?

(Testimony of A. E. Lathrop.)

A. It is simply absurd to attempt to keep the alley open for foot travel. [276—236]

Q. Why is it absurd?

A. Why, it is a great expense—

Q. You mean it is absurd because you don't think there will ever be any sufficient travel to justify it or any occasion to use it that would justify it?

A. There is no travel in that alley.

Q. Do you think there would be no travel in the alley if this portion of Burkhart Alley was closed that lies across Lots 7 and 8—would that increase the travel in the north and south alley?

A. It would, I imagine; the people would have to get into their buildings some way.

Q. What buildings?

A. On the alley, the cabins; there are two or three cabins along the alley there.

Q. Three or four, that face on the alley?

A. There may be three or four.

Q. Those people have always gotten in and out ever since their buildings have been there, through this same alley?

A. Through the Burkhart Alley.

Q. And along the north and south alley to the Burkhart Alley?

A. They don't travel that way at all—they travel through the Burkhart Alley.

Q. How do they get to the cabins?

A. Through the Burkhart Alley—they shovel a

(Testimony of A. E. Lathrop.)

path across to their cabins; their cabins are not all on the alley.

Q. They find a way of getting through?

A. Sure. [277—237]

(By Mr. MEDLEY.)

Q. Captain, the first 50 feet of the public alley next to C Street is occupied by the Adams Building on the one side and the Ostrander Building on the other?

A. Yes, the Ostrander Building is 60 feet wide instead of 50.

Q. The Ostrander Building is where the post-office used to be? A. Yes.

Q. Mail from the boats and trains was delivered to the postoffice through the alley, was it not?

A. To that point; yes.

Q. That part of the alley had to be kept continually open for travel?

A. That part of the alley was used exclusively by me and was shoveled out and kept open by me.

Q. It was kept open for travel? A. Yes, sir.

Q. The next 50 feet going toward Burkhart Alley is occupied by Clayson's two lots?

A. Yes, sir.

Q. All those buildings do not run back to the alley? A. No.

Q. Snow from his building wouldn't fall on the alley? A. No, sir.

Q. The next fifty feet toward the alley are occupied by Mr. Donohoe's two lots, which you rented? A. Yes, sir.

(Testimony of A. E. Lathrop.)

Q. Acrossed the alley from Mr. Donohoe's lots, the rear portion of the lots facing on Second Street, were not occupied, were they?

A. No, they are not occupied.

Q. And you could throw snow from your building acrossed the alley on to the vacant lots?

[278—238] A. No.

Q. Why? A. It is too long a throw.

Q. How high was the building?

A. Two stories.

Q. How high in feet?

A. Twenty-four feet, I think.

Q. You contend that a man with a shovel on top of that building couldn't throw acrossed a 14-foot alley from a 24-foot height?

A. I have hired men to shovel snow and if I could get that snow over the alley, I would certainly do it. You can't shovel that heavy snow off the building, acrossed the alley.

Q. How wide are the sidewalks in the town of Cordova?

A. On First Avenue they are ten feet, I believe.

Q. Is it possible to throw the snow off of the roofs of the buildings, acrossed the sidewalks on to the street?

A. Yes, the roofs of the buildings are very much higher on the front.

Q. Suppose they were the same height?

A. Is it possible?

Q. Yes.

Q. Yes. A. Yes, you can throw ten feet.

(Testimony of A. E. Lathrop.)

Q. But you can't throw 14?

A. No, you can't do it.

Q. You mean to tell the Court that you did not instruct the men shoveling the roof of your building to throw this snow over on to the vacant lot?

A. I mean we did not try to get it over there.

Q. And some of the snow did go over?

A. I suppose some would slide off. [279—239]

Q. The greater portion?

A. No, the greater portion would remain in the alley.

Q. You were familiar with the property known as the Horseshoe Building fronting on First Street and has its rear end on the alley? A. Yes, sir.

Q. A good portion of the time that building extended back 100 feet to the alley? A. No.

Q. Snow shoveled off of that building wouldn't fall on the alley? A. No, sir.

Q. How far back did that building extend?

A. I think 60 feet.

Q. They would have to throw the snow 40 feet then before it could hit the alley? A. Yes, sir.

Q. The same thing was true of the next building?

A. The next building don't reach the alley—it is in a gully and they have a big hole for the snow.

Q. The Horseshoe Building was a 60 foot building? A. Yes, sir.

Q. How about the next building occupied by Finklestein?

A. That is not a full length building and has a big ravine under it for snow.

(Testimony of A. E. Lathrop.)

Q. How wide is it?

A. The Finklestein Building is 50 feet.

Q. And snow from that building wouldn't land in the alley? A. No, it couldn't land in the alley.

Witness excused.

EVIDENCE CLOSED. [280—240]

Plaintiffs' Exhibit "B."

LAND CONTRACT.

No. —

THIS AGREEMENT, made in duplicate this 8th day of July, A. D. 1918, between Maud Ashland, party of the first part, of Seattle, Washington, and Alice Johnson of Cordova, Alaska, party of the second part, WITNESSETH:

The party of the first part, in consideration of the sum of Five Thousand Dollars, to be paid as hereinafter agreed, and of the faithful performance of the covenants, agreements and conditions hereinafter expressed on the part of the party of the second part, agrees to sell to the party of the second part the parcel of land situate and being in the town of Cordova, District of Alaska, according to plat recorded in Cordova Recording District, being a portion of United States official survey No. 449, described as follows, to wit: Being Lot No. 25 in Block No. 7 according to map and plat thereof recorded in the office of the recorder of Cordova Recording District of Alaska, in Book — of Deeds, page —.

The party of the second part covenants and agrees

to purchase of the party of the first part the above described lands and to pay therefor the sum of Five Thousand Dollars, as follows: \$1,000 at or before the execution of this contract, the receipt of which is hereby acknowledged; the sum of \$100 with interest from date at 12 per cent per annum on the 6th day of each and every month thereafter until paid in full at Bank of Alaska, Cordova, Alaska.

In case the party of the second part shall fail to pay when due any installment of principal or interest specified above, or to pay any taxes or assessments before the date when the same shall become delinquent, or shall fail to keep said premises, at all times during the life of this agreement, free from mechanics, laborers or other liens or shall be in default in respect to any other condition of [281—241] this agreement, then the whole of the principal and interest unpaid shall, at the option of the party of the first part, become due and payable, forthwith without notice.

The party of the second part covenants and agrees that so long as this contract remains in force he will, before the same becomes delinquent according to law, pay all taxes and assessments, ordinary and extraordinary, that may be levied or assessed, or that may become chargeable on said premises, and during all of said time he will keep said premises and the buildings and structures thereon free from all mechanics, laborers or other liens, and that the buildings or improvements now on said lands, or that shall hereafter be placed thereon, shall not be

removed therefrom, but they shall be and remain the property of the party of the first part until this contract shall be fully performed by the party of the second part. Should default be made in the payment of the principal or interest aforesaid, or in the payment of the taxes or assessments upon said land, or in the performance of any other covenant herein contained, then, and in that case, this agreement, at the option of the party of the first part shall be null and void, and all payments that shall have been made, and all buildings and improvements on said land, shall be and forever remain the absolute property of the party of the first part, it being expressly understood and agreed that time is the essence of this contract.

The party of the first part hereby reserves the right, at any time during the life of this agreement, to post the notice required by section 265 of the Civil Code of Alaska relating to liens, upon said premises or buildings being constructed thereon.

Upon a full and prompt performance by the party of the second part of each and every of the said covenants and agreements by him to be performed, including the payments at the times above set forth, the party of the first part will execute and deliver to the party of [282—242] the second part, a deed of conveyance of the said land upon the surrender and delivery to the party of the first part of this agreement.

Notice of the cancellation of this contract for any breach thereof or notice of the exercise of any other right reserved to the first party herein where this

contract requires notice, shall be addressed to the party of the second part, directed to the postoffice named below, postage prepaid and deposited in the United States postoffice which shall constitute a good and sufficient notice and service thereof.

No assignment or transfer of any interest in this agreement or said premises, less than the whole, will be recognized by the said party of the first part under any circumstances and no assignment shall be binding upon the party of the first part unless in writing endorsed thereon, and approved in writing indorsed thereon by the party of the first part.

Except as herein otherwise provided, this contract shall bind and inure to the benefit of the respective heirs, representatives, successors and assigns of both parties, but no waiver of any of the provisions hereof or any right hereunder shall be valid unless in writing indorsed thereon.

IN WITNESS WHEREOF, the party of the first part and the party of the second part have hereunto subscribed their names and affixed their seals the day and year first above written.

MAUD ASHLAND,

Party of the First Part,

By ROBERT ASHLAND,

Her Attorney in Fact.

ALICE JOHNSON,

Party of the Second Part,

P. O. Address, Cordova, Alaska.

Witnesses to signature of first party:

E. L. HARWOOD.

A. J. ADAMS.

Witnesses to signature of second party:

A. J. ADAMS. [283—243]

United States of America,
District of Alaska,—ss.

This is to certify that before me, A. J. Adams, duly commissioned and qualified, personally appeared Maud Ashland by Robert Ashland, her attorney in fact hereunto duly authorized, to me personally known to be the individual described in and who executed the foregoing agreement and acknowledged to me that they signed the same as their voluntary deed for the uses and purposes therein mentioned.

Given under my hand and seal this the 8th day of July, A. D. 1918.

[Notarial Seal]

A. J. ADAMS,

Notary Public for Alaska.

My Commission expires Feby. 2, 1921.

N. B.—This contract cannot be executed by another for the party of the second part excepting under a properly executed power of attorney, which must be filed with the party of the first part. [284—244]

Certificate of Official Court Stenographer.

I do hereby certify that I am the Official Court Stenographer for the Third Judicial Division of the Territory of Alaska; that as such I reported the proceedings had at the trial of the above-entitled cause, to wit, A. E. Lathrop and Alice Johnson vs. H. A. Slater and Bank of Alaska, a Corporation, being cause No. C/173 of the records of this court;

that the foregoing transcript is a full, true and correct transcript of the evidence introduced and proceedings had at said trial.

I. HAMBERGER.

Dated at Valdez, Alaska, May 15, 1920. [285—
245]

Filed in the District Court, Territory of Alaska,
Third Division. Mar. 18, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corpo-
ration,

Defendants.

Decision.

All the parties to this action are owners of town lots in the incorporated town of Cordova, Third Judicial Division, Territory of Alaska. The plaintiffs seek to enjoin the defendants from closing a certain alley in the town of Cordova which will hereafter be referred to as "Burkhart Alley." Plaintiffs plead a special and different damage from that sustained by the general public and bring action to protect their own rights and for and on behalf of the general public of the town of Cordova. The foregoing brief statement discloses the nature of the action. Issues

having been joined the case was tried to the Court without a jury.

The townsite of Cordova is located for the most part upon a very rough and uneven hillside. First Street, the principal business street of the town, runs north and south. East of First Street and parallel with it is Second Street. The distance between the two streets is 214 feet. Block Seven lies between the two streets. [286] It is subdivided into 32 lots, each 25 feet in width and 100 feet in depth. It is bounded on the north by C Street and on the South by B Street. An alley 14 feet in width, parallel with First Street and Second Street, runs through the entire block.

First Street slopes to the South; Second Street slopes to the north; C Street slopes to the west, intersecting with First Street at an elevation of about 8 feet lower than its intersection with Second Street. The result is that B Street is very steep, its intersection with Second Street being at an elevation of about 26 feet higher than its intersection with First Street. Lots 7 and 8 front on First Street and directly back of them are lots 26 and 25, respectively, fronting on Second Street. On First Street and across the street from lots 7 and 8 is located the "Lathrop Building," the property of A. E. Lathrop, one of the plaintiffs. The plaintiff Alice Johnson is the owner of Lot 25 upon which is located a building known as the "Burkhart Apartments." The defendant H. A. Slater is the owner of lot 7 upon which is located the "Slater Building." The Bank of Alaska, a corporation, is the owner of lot 8, upon

which is erected a substantial business building. It will thus be seen that lots 7, 8, 26 and 25 are approximately in the middle of the block. Block 7, and particularly that portion of it fronting on First Street is in the main business portion of the town.

“Burkhart Alley” begins on First Street and extends through Block 7 to Second Street. It is 8 feet in width. This 8 feet is made up from the south 4 feet of [287] Lots 7 and 26 and the north 4 feet of Lots 8 and 25. It intersects at right angles the alley heretofore described as being 14 feet wide in the middle of the block and parallel with First and Second Streets. As shown by Defendants’ Exhibits 1 and 2, “Burkhart Alley” for the first 100 feet running back to Second Street is entirely covered over by the “Slater Building” and the building of the Bank of Alaska. The walls of these buildings meet at the height of 12 feet from the sidewalk on a line directly above the boundary line of lots 7 and 8. The first 100 feet of “Burkhart Alley” is level and covered with a board walk. At the point of intersection with the alley running north and south through the block “Burkhart Alley” continues up a sharp incline to Second Street. The “Burkhart Apartments” and the buildings across from it on “Burkhart Alley” are both built 4 feet back from the boundary line between lots 26 and 25, but, as is shown on Plaintiffs’ Exhibit “A” and Defendants’ Exhibit No. 2, a walk twenty inches wide, constructed on a line between the basement and the first store of the “Burkhart Apartments,” extends into the “Alley” the distance of its width along the “Apart-

ments.” This walk is necessary to enable occupants to have a side entrance from the “Alley” to rooms in the “Apartments” on the first floor. The “Alley” is planked from Second Street to the rear of the “Slater Building” and the guilding of the Bank of Alaska. As shown by Defendants’ Exhibit No. 3, there are two entrances to the “Slater Building” from “Burkhart Alley,” also two entrances to the building of the Bank of Alaska. At the entrance to “Burkhart Alley” from Second Street the [288] town maintains a street light, and directly across Second Street from the light the town maintains a fire hydrant. It also maintains a light in “Burkhart Alley” very near the rear of the “Slater Building” and the building of the Bank of Alaska. The town maintains a cross-walk across First Street to the sidewalk in front of the “Lathrop Building.” This cross-walk is 6 feet wide and its center line appears to be a projection of the center line of “Burkhart Alley.” The foregoing description of the present physical condition of the premises is in accordance with the evidence all of which is verified by a personal viewing of the premises.

A stipulation entered into by the attorneys of the parties hereto and filed as Defendants’ Exhibit No. 6 traces Slater’s title to lot 7 back to a land contract dated June 12, 1908, entered into between George C. Hazelet, Trustee, and Robert Ashland, followed by a warranty deed dated June 16, 1909, from the said Hazelet to the said Ashland; the title of the Bank of Alaska to lot 8 to a land contract dated June 4, 1908, entered into between George C. Haze-

let, Trustee, and A. E. Burkhart, followed by a warranty deed dated July 12, 1909, from said Hazelet to said Burkhart; the title of Alice Johnson to lot 25 to a warranty deed dated October 1, 1908, from the Copper River Railway Co. to H. B. Burkhart; and the title to lot 26, now being in the Carstens Packing Company, to a land contract dated June 9, 1908, entered into between Geo. C. Hazelet, M. Finkelstein and J. Sapiro, running from the said Hazelet to the said Finkelstein and Sapiro.

The witnesses Robert Ashland, Dave McDonald and [289] M. Finkelstein testify that the owners of lots 7, 8, 26 and 25, at the time buildings were constructed thereon, created "Burkhart Alley" under a belief that it could be closed by them whenever they saw fit so to do. It is testified that the passageway was for the convenience of the owners in conducting their respective lines of business, but the silent witnesses, the buildings themselves, together with all the other testimony in the case, show that this passageway was for the purpose of affording the public easy access to the respective places of business conducted on these lots rather than for the convenience of the property owners. To fully understand the advantage "Burkhart Alley" was to the business interests being conducted on these lots one must bear in mind that Block 7 is 400 feet long by 214 feet in width and that "Burkhart Alley" cuts it in two at about its center, thus making each of lots 7, 8, 26 and 25 an alley corner. B Street is very steep and it naturally follows that the average pedestrian, especially in inclement weather, in

going from First Street to Second Street, travels through "Burkhart Alley" with its passageway covered for nearly half of its entire length. The owners of these properties made the strongest kind of a bid for business by creating "Burkhart Alley" and the testimony shows that the foot travel through this "Alley" has for years exceeded the entire foot travel on both B and C Streets. The owners of these properties are to be commended for their business acumen in thus bringing the public to their very doors.

The evidence further discloses that the Town authorities were not unmindful of the importance of "Burkhart Alley" as a thoroughfare. It was neither an arcade [290] nor was it a cul-de-sac, and I am unable to agree with the contention of counsel that the board walk, 8 feet wide and 100 feet long constructed over portions of lots 7 and 8, was in the nature of a "platform." From "Burkhart Alley" the town maintained a cross-walk across First Street, put in hydrants in a position commanding the "Alley," maintained a street light at the Second Street entrance and since 1915 lighted the "Alley" at the rear of the buildings on lots 7 and 8. The town exercised dominion over the "Alley" through its police department, requiring the owners of lots 7 and 8, 26 and 25 to keep the walk in repair, remove the obstructions placed therein by the owners and their tenants, and to remove accumulations of snow. The course of conduct by the police with reference to the user of the "Alley," the conduct of the owners in granting, in

fact, inviting such use, and the action of the town in exercising dominion over it, have been continuous for a period of more than ten years. It is argued by counsel for the defendants that neither the present owners nor their predecessors in interest ever intended to grant an easement to the public to use "Burkhart Alley"; that the paying of taxes on the lots, keeping the "Alley" in repair, maintaining an awning over on First Street entrance, paying for a light in about the center of the covered portion, making use of it in various ways incident to a use of the buildings abutting thereon for business purposes, negatives any dedication on the part of the owners, and that the joining of the buildings on lots 7 and 8 at the second story for the entire depth of these [291] lots is conclusive proof that there was no right acquired by the public or anyone else either by prescription or by implied dedication.

The distinguishing feature of this case as compared with any cited counsel or any I have been able to find is the joining of the buildings on lots 7 and 8 at the second story. Ordinarily we think of a street or an alley as having unlimited overhead room. This, however, is not absolutely necessary. The owners of lots 7 and 8 could dedicate a limited or an unlimited overhead space. They elected to dedicate a space 8 feet wide, 12 feet high, and 100 feet in length. It was a matter entirely within their control. The question is neither how much nor how little they dedicated. The public accepted the limited space dedicated from lots 7 and 8, the space dedicated from lots 26 and 25 limited

as to width, unlimited as to height. I am convinced that the plaintiff Lathrop has shown a damage special and different from that sustained by the general public though it is not so clear and persuasive as that shown to be sustained by the plaintiff Johnson. If "Burkhart Alley" is closed she sustains a very serious damage as shown by all the evidence. Access to her property through the alley running through the block from B Street to C Street would be of little service even if it were kept in good condition. The evidence shows that its greatest service to the public is as a measure of fire protection and storage-room in the winter for snow from the roofs of the abutting buildings.

In the consideration of this case the Court has been greatly assisted by exhaustive briefs filed by counsel. In my opinion the facts in this case show by a fair preponderance [292] of the evidence that from the time the owners of lots 7, 8, 26 and 25 in Block 7 first constructed buildings thereon, until the defendants in 1919 undertook to close "Burkhart Alley," the said owners and their successors in interest impliedly dedicated "Burkhart Alley" as herein described to the use of the general public.

In 18 C. J., page 53, it is stated:

"2. Intent manifested by acts decisive.

The intention to dedicate to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts. It is not always necessary that an actual intention should exist in the mind of

the owner at the time of the alleged dedication. If the intention is clearly expressed by his open acts and visible conduct, the public and individual citizens may act upon it; and the fact that the owner may have entertained a different intention from that manifested by his acts or declarations, or that in making the dedication he may have acted under a mistake of fact, is of no consequence; and if the owner showed an intent he cannot defeat the effect of his acts by subsequently stating that he did not intend to make a dedication."

Continuing on page 57, the author says:

"Implied dedication—a. In General. One of the methods of acquiring the right to the use of land for the public is that of the implied dedication of the same by the owner of the fee. A dedication is implied when the acts and conduct of the owner manifest an intention to devote the property to public use, and are inconsistent with any other theory than that he intended a dedication. It arises by operation of law, and according to many decisions, is founded upon the doctrine of estoppel in pais, and not upon grant. Under some circumstances a dedication will be implied even against the express declarations of the owner of the land. Whether a dedication has been made is essentially a question of fact, and a fact which may be established by indirect evidence, as no formalities in making a dedication are essential."

Cincinnati vs. White, 31 U. S. 289.

Riley v. Buchanan, 76 S. W. 527.

Kennedy et al. vs. City of Portland, 179 Pac. 667.

In re Roosevelt Ave. in City of New York, 174 N. Y. S. 600.

Evans vs. City of Brookings, 170 N. W. 133.

Wensel vs. Chicago M. & St. P. Ry. Co., 170 N. W. 409, 8 R. C. L., sec. 25, page 900.

Humphrey et al. vs. Krutz et al., 137 Pac. 806.

Robinson v. Gebauer, 152 N. W. 329.

Pittsburg C. C. & St. L. Ry. Co. vs. Ervington, 108 N. E. 133. [293]

The discussion of the law on the subject of dedication in *Keppler vs. City of Richmond*, 98 S. E. 747, is very illuminating. The facts, however, did not permit the Supreme Court to affirm the decision of the Chancery Court. In *re Stees*, 172 N. W. 219, is also of interest in that it shows how the owner of the property for a period of twenty years kept his boundary line marked conspicuously upon the sidewalk. In the case at bar it will be remembered that there was no such distinctive marking nor did the owners of lots 7 and 8 ever put up any sign at either entrance to "Burkhart Alley" or anywhere else therein designating it as a "private way." A keen observer might notice that at a point beginning in the center of the "Alley" at the second story there is a board about six inches in width running to the cornice. The cornice, however, continues along the front of both buildings on

the same line and without a break at the dividing line. The siding, also, is board for board on the same line from the cornice to the beginning of the second story. I do not think the public could reasonably be held to be put upon inquiry as to boundary lines by the style of building. The public was not interested in the second story except in so far as it afforded protection in inclement weather.

There is some evidence showing that the owners of lots 7 and 8 use a portion at least of the space under the sidewalk through the "Alley" and therefore it is contended by the defendants that the easement, if such it is, amounts to nothing more than an easement of a "hole in the air." In answer to this it may be said that the public is not concerned with what use is made of the space under the walk. If the defendants choose to term it merely a "hole in the air" such a description will not affect the [294] rights of the plaintiffs or of the general public. In fact, that is exactly what they are now insisting it is and has been and that it be maintained.

See *In re Third Ave.*, 130 N. Y. S. 80-84.

Findings of Fact and Conclusions of Law in accordance with the views herein expressed may be prepared and submitted.

Dated March 1, 1920.

CHARLES E. BUNNELL,
District Judge.

Entered Court Journal No. 12, page No. 622.
[295]

Filed in the District Court, Territory of Alaska,
Third Division. May 26, 1920. Arthur Lang,
Clerk. By C. F. Wilcox, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial at Cordova, Alaska, on the 11th day of December, 1919, and was tried by the Court without a jury. Each of the plaintiffs being present in person and represented by their attorneys, Donohoe & Dimond and the defendant H. A. Slater being present in person and represented by his attorney, Edward F. Medley, Esq., and the defendant Bank of Alaska, a corporation, being represented by its attorney, B. O. Graham, Esq., and the Court having heard all the testimony and the argument of counsel, took the matter under advisement and granted the attorneys of the respective parties the right to file their briefs and thereafter briefs were duly filed and given due consideration by the Court, and the Court after duly considering all the evidence introduced and being fully advised in the premises did on the 1st day of

March, 1920, render its written opinion in favor of the plaintiffs and against the defendants and in accordance with said written opinion now makes and enters its written findings of fact and conclusions of law. [296]

FINDINGS OF FACT.

I.

The Court finds that each of said plaintiffs are citizens of the United States, residents and inhabitants of the town of Cordova, Territory of Alaska; that each of said plaintiffs are particularly damaged in a manner special and different from the damage to the general public of the town of Cordova, by the acts committed by the above-named defendants and in the acts threatened to be committed by the above-named defendants as hereinafter set forth. That plaintiffs bring this action to protect their own private rights and for and on behalf of the general public of the said town of Cordova.

II.

That the defendant Bank of Alaska is a corporation organized and existing under and by virtue of the laws of the territory of Alaska; that each of said defendants have duly and regularly entered a general appearance in this action and this Court has jurisdiction of the person of all the parties to this action and of the subject matter of this action.

III.

That the plaintiff A. E. Lathrop is the owner of Lots Nos. 23, 24 and 25 in Block No. 2, of the town of Cordova, which property abuts on the westerly side line of First Street of said town of Cordova;

that said plaintiff has erected on said property within the past year a large building at a cost of upwards of One Hundred Thousand (\$100,000.00) Dollars, that in said building said plaintiff operates a motion picture theater and rents a number of stores for the conduct of mercantile businesses and also rents a number of living apartments and offices. [297] That the town of Cordova maintains a cross-walk across First Street from the westerly terminus of Burkhart Alley, hereinafter described, to the main entrance of this plaintiff's said building; that a large number of the patrons of this plaintiff's theater and customers of his tenants and a large number of his tenants occupying his apartments and offices reach said building by way of and through Burkhart Alley and over said cross-walk. That if said defendants are permitted to obstruct said Burkhart Alley and close the same to the travel of the general public and to this plaintiff, this plaintiff will be specially damaged thereby, by causing a reduction in the rental values of said building and this plaintiff's income therefrom and will greatly depreciate the value of this plaintiff's said building and he will thereby suffer irrevocable injury and loss.

IV.

That plaintiff Alice Johnson is the owner of Lot No. 25, in Block No. 7, of the town of Cordova; that said lot lies along the southerly side of Burkhart Alley hereinafter described; that the easterly end of said lot, abuts on the westerly side line of Second Street and extends from Second Street in

a westerly direction a distance of one hundred (100) feet to the fourteen (14) foot alley running north and south through block No. 7, of said town of Cordova; that this plaintiff has upon said lot a three (3) story building used by her as an apartment house; that the only entrance to her said apartments on the basement story is off Burkhart Alley and on the second story by a walk from Second Street along said building projecting into Burkhart Alley 20" wide to entrances facing on Burkhart Alley; that this plaintiff purchased [298] said lot on the 8th day of July, 1918, at which time and for a great many years prior thereto, Burkhart Alley was and had been an open public way and was and had been continually used by the public as such. That if the said defendants are permitted to obstruct the said Burkhart Alley and close the same to travel by the general public and to the use of this plaintiff, this plaintiff will suffer irreparable injury and loss in her property rights in said lots and building thereon and the rental value of her apartments will be greatly depreciated and the value of her said lot and building will be greatly depreciated.

V.

That on or about the month of May, 1908, the tract of land now covered by the town of Cordova was surveyed, platted and laid off in lots and blocks, streets and alleys; that Block No. 7, in said town, contains Lots Nos. from 1 to 16, inclusive, abutting on the easterly side of First Street and Lots Nos. from 17 to 32, inclusive, abutting on the westerly

side of Second Street; that said block is 400 feet long by 214 feet wide. That there is an alleyway 14 feet wide and extending northerly and southerly through the center of said block from "C" Street on the north to "B" Street on the south; that during the years 1908 and 1909, the original owners of the townsite of Cordova sold to the general public practically all the lots in said townsite of Cordova and a great number of buildings have been erected on said lots; that First Street is the principal business street in said town; that at the time of this trial, the population of said town of Cordova was between 2,000 and 3,000 people.

VI.

That in the summer of the year 1908, Lot No. 7, [299] in Block No. 7, of said town was owned by Robert Ashland; Lot No. 8 in Block No. 7 was owned by A. E. Burkhart; Lot No. 25 in Block No. 7 was owned by A. E. Burkhart; Lot No. 26 in Block 7 was owned by M. Finkelstein and J. Sapiro; that at said time the owners of said lots were about to erect buildings upon their respective lots and they agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town; the center line of said alley running along the dividing line between lots Nos. 7 and 8 and Lots Nos. 25 and 26 in said Block No. 7, in said town; that the owners of Lot No. 7 and Lot No. 26 in Block No. 7, gave 4 feet off the southerly side of their said lots for said alley and the owners of Lots Nos. 8 and 25, in Block No. 7 gave 4 feet off the northerly side of their said lots for said alley; that

said alley thereupon became known and ever since has been and now is known as and called Burkhart Alley; that shortly thereafter the owners of the four lots herein described erected buildings on each of their said lots, the side walls of said buildings being four feet from the side line of said lots, thus leaving an alley eight feet wide from First Street to Second Street; that the owners of said lots made many entrances into their said buildings from Burkhart Alley; that at the time said alley was opened as hereinbefore described, the owner of Lot No. 25 erected two high walks 20 inches wide which did not follow the grade of the alley but were on a level of the first and second floor of the building erected on said Lot No. 25, so that the occupants of the apartments in said building might conveniently reach the same in said alley; that when the buildings were erected on Lots Nos. 7 and 8, the side walls of each of said buildings [300] for the first story were set back four feet from the side line of the respective lots, but at a height of 12 feet the floor of the second story of each of said buildings was extended out to the dividing line between said lots, thus leaving a covered passageway or alley 8 feet wide by 12 feet high and 100 feet long; that Burkhart Alley as herein described was originally opened up and ever since has been used and maintained.

VII.

That said Burkhart Alley was first opened to public travel about the month of October, 1908, and it ever since has been used by the general public

as a public highway and ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs.

VIII.

That on the 14th day of July, 1909, the municipality of the town of Cordova was duly incorporated and organized; that from that day until the trial of this action the common council of the town of Cordova has exercised rights of ownership, authority and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever; that the said common council has provided for the lighting of said Burkhart Alley a good portion of said time and has supervised and required the sidewalk in said alley to be kept in good repair and has caused fire hydrants to be placed opposite the intersection of said [301] Burkhart Alley with First Street and Second Street; had erected and maintained a good substantial cross-walk six feet wide from the westerly terminus of Burkhart Alley across First Street; that the center line of said cross-walk is a continuation of the center line of said Burkhart Alley and by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time.

IX.

That at no time since Burkhart Alley was opened to the public use as hereinbefore described have the

owners of any of the four lots abutting on said alley claimed or contended to the public that said alley was not a public highway until defendant Slater herein on the 8th day of August, 1919, and the defendant Bank of Alaska, on the 10th day of September, 1919, attempted to obstruct and close said Burkhart Alley and prevent the public and these plaintiffs from the free use and enjoyment thereof.

XI.

That defendant H. A. Slater became the owner of Lot No. 7 in Block No. 7, in the said town in the year 1917; that defendant Bank of Alaska became the owner of Lot No. 8 in Block No. 7 in said town in the year 1918; that at the time each of said defendants purchased their respective lots, said Burkhart Alley was a public highway and had been continuously used by the general public since the year 1908 as a public highway and each of said defendants had full knowledge of said fact. [302]

XI.

That on the 8th day of August, 1919, defendant H. A. Slater unlawfully and without right or authority obstructed the free use and enjoyment of Burkhart Alley as a public thoroughfare and prevented these plaintiffs and the general traveling public from the free use and enjoyment of said Burkhart Alley as a public highway by fencing off and enclosing four feet of the northerly side of Burkhart Alley extending along the entire length of Lot No. 7 in Block No. 7; that on the 10th day of September, 1919, the defendant Bank of Alaska, ob-

structed and prevented the free use and enjoyment of said Burkhart Alley as a public thoroughfare by erecting a fence enclosing the southerly four feet of said Burkhart Alley commencing at First Street and extending a distance of 100 feet to the rear of Lot No. 8 in Block No. 7 of said town of Cordova; that each of said defendants unlawfully claimed the right to close and obstruct Burkhart Alley as the same passes over and upon Lots Nos. 7 and 8 in said Block No. 7 and each of said defendants threaten to and intend to permanently obstruct and close said Burkhart Alley from First Street to the rear of Lots Nos. 7 and 8, a distance of 100 feet, and threaten to and intend to prevent these plaintiffs and the general public of the town of Cordova from occupying, using and enjoying said Burkhart Alley as a public thoroughfare, and unless each of said defendants are enjoined by this Court, they and each of them will obstruct and close said Burkhart Alley as above set forth and will prevent these plaintiffs and the general public of said town of Cordova from the free use and enjoyment of said Burkhart Alley. [303]

XII.

That if said defendants or either of them is permitted to obstruct and close said Burkhart Alley and prevent these plaintiffs and the general public from the free use and enjoyment of said Burkhart Alley, these plaintiffs will suffer great and irreparable injury and loss in their property rights and the traveling public of the town of Cordova will suffer great inconvenience, loss and damage.

XIII.

That more than ten (10) years have elapsed since said Buhkhart Alley was first used as a public street, prior to the time either of these defendants first asserted or claimed the right to close said alley or any portion thereof; and during all of said time, said Burkhart Alley was continuously and without interruption used by and in the exclusive possession of the inhabitants, residents and general public of the said town of Cordova, as a public street or alley, with the knowledge and acquiescence at all times of the owners of all of said lots crossed by said alley and without license, or permission of, or hindrance or objection from, any person or persons whomsoever; and that such use and possession by the public of said alley as a public alley was during all of said time adverse, hostile, continuous, exclusive and under color and claim of right; that the common council of the town of Cordova, shortly after said Burkhart Alley was first opened to public travel and use as hereinbefore stated, accepted said alley as a public thoroughfare by lighting the same, keeping the same clear from all obstructions, requiring the sidewalk in said alley [304] to be kept in good repair and generally exercised supervision, control and ownership over said alley and continued to do so up to the present time; that the travel and use of said alley by the general public passing through said alley and over and upon the same, far exceeded the travel on either "B" or "C" Street

between First and Second Street during all the time hereinbefore mentioned.

XIV.

That plaintiffs have no plain, speedy or adequate remedy at law.

Dated this 26th day of May, 1920.

CHARLES E. BUNNELL,
Judge.

CONCLUSIONS OF LAW.

From the foregoing findings of fact, the Court makes and enters its conclusions of law as follows:

I.

That said Burkhart Alley in the month of October, 1908, became and ever since has been and now is a public thoroughfare or alley by reason of an implied dedication arising from the acts of the owners of Lots Nos. 7 and 8 and Lots Nos. 25 and 26, in Block No. 7, in the town of Cordova.

II.

That said Burkhart Alley as described in the foregoing findings of fact, at the time when said defendants attempted to obstruct a portion of said alley, to wit, on the 8th day of August, 1919, and on the 10th [305] day of September, 1919, was, and even since has been, and now is, a public thoroughfare and alley by prescription, the same having been used exclusively and continuously by the general public of the town of Cordova for a period of more than ten years prior to the said 8th day of August, 1919, under color of title and claim of right, and adverse and hostile to the owners of the respective lots over which said alley

passes and with the knowledge and acquiescence of said owners, but without their license or permission, and without any objections from them or any of them.

III.

That plaintiffs are entitled to have said Burkhart Alley, as described in the foregoing findings of fact, maintained and kept free from obstructions and continuously open for the free and uninterrupted travel and use by these plaintiffs and the general public of the town of Cordova, as a public thoroughfare or alley.

IV.

That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or closing said Burkhart Alley as described in the foregoing findings of fact where the same passes upon and over Lots Nos. 7 and 8, in Block No. 7, in said town of Cordova, to wit: An alley eight (8) feet wide, the center of which is the dividing line between Lots Nos. 7 and 8, in Block No. 7, and twelve (12) feet high for the entire length of Lots Nos. 7 and 8, and from in any manner whatever obstructing or closing said alley or any part or portion thereof or in any manner interfering with the free use and enjoyment thereof as a public highway as the same was then [306] first laid out and opened to public use and travel and ever since has been used and traveled by the public.

V.

That plaintiffs have decree against defendants

and each of them in accordance with their prayer of their amended complaint and in accordance with the foregoing conclusions of law, and have judgment against said defendants and each of them for the costs and disbursements incurred in this action by plaintiffs.

Dated this 26th day of May, 1920, and done and signed in open court.

By the Court:

CHARLES E. BUNNELL,
District Judge.

Entered Court Journal No. 12, page No. 807.
[307]

Filed in the District Court, Territory of Alaska,
Third Division. May 26, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,
Defendants.

Defendants' Exceptions to Findings of Fact and Conclusions of Law.

1. The defendants except to that part of Finding No. 1 which reads as follows:

“that each of said plaintiffs are particularly damaged in a manner special and different from the damage to the general public of the town of Cordova, by the acts committed by the above-named defendants and in the acts threatened to be committed by the above-named defendants as hereinafter set forth.”

upon the ground that said finding in so far as it relates to the plaintiff Lathrop is not supported by the evidence. Defendants also except to that part of Finding No. 1, quoted above, upon the ground that it is not supported by the evidence in so far as it relates to the plaintiff Johnson.

2. The defendants except to that portion of Finding No. 1 which reads as follows:

“That plaintiffs bring this action for and on behalf of the general public of the said town of Cordova,”

for the reason that said proposition is not supported by the evidence. [308]

3. The defendants except to that portion of Finding No. 3 which reads as follows:

“That if said defendants are permitted to obstruct said Burkhart Alley and to close the same to the travel of the general public and to this plaintiff, this plaintiff will be specially

damaged thereby, by causing a reduction in the rental values of said buildings and this plaintiff's income therefrom and will greatly depreciate the value of this plaintiff's said building and he will suffer irrevocable injury and loss,"

upon the ground that said proposition, in so far as it relates to the plaintiff Lathrop, is not supported by the evidence.

Defendants also except to the above-quoted part of the said Finding No. 3 upon the ground that, in so far as it relates to the plaintiff Johnson, it is not supported by the evidence.

4. Defendants except to that portion of Finding No. 4, which reads as follows:

"that the only entrance to her said apartments is off Burkhart Alley,"

upon the ground that said proposition is not supported by the evidence. This finding modified by the Court and defendants excepted to the same, as modified, upon the same ground.

5. Defendants except to that portion of Finding No. 4 which reads as follows: [309]

"at which time and for a great many years prior thereto, Burkhart Alley was and had been an open public way,"

upon the ground that said proposition is not supported by the evidence.

6. Defendants except to that part of Finding No. 4 which reads as follows:

"and was and had been continually used by the public as such,"

upon the ground that said proposition is not supported by the evidence.

7. Defendants except to that part of Finding No. 4 which reads as follows:

“That if the said defendants are permitted to obstruct the said Burkhart Alley and to close the same to travel by the general public and to the use of this plaintiff, this plaintiff will suffer irreparable injury and loss in her property rights in said lot and building,”

upon the ground that said proposition is not supported by the evidence.

8. Defendants except to that part of Finding No. 4 which reads as follows:

“and the rental value of her apartments will be greatly depreciated and the value of her said lot and building will be greatly depreciated,”

upon the ground that said proposition is not supported by the evidence.

9. Defendants except to that part of Finding No. 6 which reads as follows:

“and they agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town,”

upon the ground that said proposition is not supported by the evidence. [310]

10. Defendants except to that part of Finding No. 6 which reads as follows:

“that the owners of Lot No. 7 and Lot No. 26 in Block No. 7, gave 4 feet off the Southerly side of their said lots for said Alley,”

upon the ground that said proposition is not supported by the evidence.

11. Defendants except to that part of Finding No. 6 which reads as follows:

“the owners of Lots Nos. 8 and 25, in Block No. 7, gave 4 feet off the Northerly side of their said lots for said alley,”

upon the ground that said proposition is not supported by the evidence.

12. Defendants except to that part of Finding No. 6 which reads as follows:

“that Burkhart Alley as herein described was originally opened up and ever since has been used and maintained,”

upon the ground that said proposition is not supported by the evidence and upon the further ground that said finding is too indefinite and uncertain in that it does not show by whom said so-called alley was maintained.

13. Defendants except to that part of Finding No. 7 which reads as follows:

“That said Burkhart Alley was first opened up to public travel about the month of October, 1908,”

upon the ground that said proposition is not supported by the evidence.

14. Defendants except to that part of Finding No. 7 [311] which reads as follows:

“and it ever since has been used by the general public as a public highway,”

upon the ground that said proposition is not supported by the evidence.

15. Defendants except to that part of Finding No. 7 which reads as follows:

“and even since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs,”

upon the ground that said proposition is not supported by the evidence.

16. Defendants except to that part of Finding No. 7 which reads as follows:

“and ever since has . . . without . . . permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs,”

upon the ground that said proposition is not supported by the evidence.

17. Defendants except to that part of Finding No. 8 which reads as follows:

“the common council of the town of Cordova has exercised rights of ownership, authority and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever,”

upon the ground that said proposition is not supported by the evidence.

18. Defendants except to that part of Finding No. 8 which reads as follows:

“that the said common council has provided for the lighting of said Burkhart Alley a good portion of said time,” [312]

upon the ground that said proposition is not supported by the evidence.

19. Defendants except to that part of Finding No. 8 which reads as follows:

“and has supervised and required the sidewalk in said alley to be kept in good repair,” upon the ground that said proposition is not supported by the evidence.

20. Defendants except to that part of Finding No. 8 which reads as follows:

“and by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time,” upon the ground that said proposition is not supported by the evidence, and is indefinite and uncertain.

21. Defendants except to that part of Finding No. 9 which reads as follows:

“That at no time since Burkhart Alley was opened to the public use as hereinbefore described, have the owners of any of the four lots abutting on said alley claimed or contended to the public that said alley was not a public highway until defendant Slater herein on the 8th day of August, 1919, and the defendant Bank of Alaska, on the 10th day of September, 1919, attempted to obstruct and close said Burkhart Alley and prevent the public and these plaintiffs from the free use and enjoyment thereof,”

upon the ground that said proposition is not supported by the evidence.

22. Defendants except to that part of Finding No. 10 which reads as follows:

“that at the time each of said defendants purchased their respective lots, said Burkhart Alley was a public highway,” [313]

upon the ground that said proposition is not supported by the evidence.

23. Defendants except to that part of Finding No. 10 which reads as follows:

“and has been continuously used by the general public since the year 1908, as a public highway,”

upon the ground that said proposition is not supported by the evidence.

24. Defendants except to that part of Finding No. 10 which reads as follows:

“and each of said defendants had full knowledge of said fact,”

upon the ground that said proposition is not supported by the evidence, as to either of said defendants.

25. Defendants except to that part of Finding No. 11 which reads as follows:

“That on the 8th day of August, 1919, defendant H. A. Slater unlawfully and without right or authority obstructed the free use and enjoyment of Burkhart Alley,”

upon the ground that said proposition is not supported by the evidence.

26. Defendants except to that part of Finding No. 11 which reads as follows:

“that each of said defendants unlawfully claimed the right to close and obstruct Burkhart Alley,”

upon the ground that said proposition is not supported by the evidence.

27. Defendants except to that part of Finding No. 12 [314] which reads as follows:

“That if said defendants or either of them is permitted to obstruct and close said Burkhart Alley and prevent these plaintiffs and the general public from the free use and enjoyment of said Burkhart Alley, these plaintiffs will suffer great and irreparable injury and loss in their property rights,”

upon the ground that said proposition is not supported by the evidence.

28. Defendants except to that part of Finding No. 12 which reads as follows:

“and the travelling public of the town of Cordova will suffer great inconvenience, loss and damage,”

upon the ground that said proposition is not supported by the evidence.

29. Defendants except to that part of Finding No. 13 which reads as follows:

“That more than ten (10) years have elapsed since said Burkhart Alley was laid out and first used as a public street, prior to the time either of these defendants first as-

serted or claimed the right to close said alley, or any portion thereof,"

upon the ground that said proposition is not supported by the evidence.

30-a. Defendants except to that part of Finding No. 13 which reads as follows:

"and during all of said time, said Burkhart Alley was continuously and without interruption used by and in the exclusive possession of the inhabitants, residents and general public of the said town of Cordova, as a public street or alley,"

upon the ground that said proposition is not supported by the evidence.

30-b. Defendants except to that part of Finding No. 13 which reads as follows:

"with the knowledge and acquiescence at all times of the owners of all of said lots crossed by said alley and without license or permission of, or hindrance or objection from any person or persons whomsoever," [315]

upon the ground that said proposition is not supported by the evidence.

30-c. Defendants except to that part of Finding No. 13 which reads as follows:

"and that such use and possession by the public of said alley as a public alley was during all of said time, adverse, hostile, continuous, exclusive and under color and claim of right,"

upon the ground that said proposition is not supported by the evidence.

31. Defendants except to that part of Finding No. 13 which reads as follows:

“that the common council of the town of Cordova, shortly after said Burkhart Alley was first opened to public travel and use as hereinbefore stated, accepted said alley as a public thoroughfare by lighting the same,”

upon the ground that said proposition is not supported by the evidence.

32. Defendants except to that part of Finding No. 13 which reads as follows:

“That the common council of the town of Cordova . . . accepted said alley as a public thoroughfare by . . . keeping the same clear from all obstructions,”

upon the ground that said proposition is not supported by the evidence.

33. Defendants except to that part of Finding No. 13 which reads as follows:

“that the common council of the town of Cordova . . . accepted said alley as a public thoroughfare by . . . requiring the sidewalk in said alley to be kept in good repair,”

[316]

upon the ground that said proposition is not supported by the evidence.

34. Defendants except to that part of Finding No. 13 which reads as follows:

“and generally exercised supervision, control and ownership over said alley and continued to do so up to the present time,”

upon the ground that said proposition is not supported by the evidence and is indefinite and uncertain.

35. Defendants except to that part of Finding No. 13 which reads as follows:

“that the travel and use of said alley by the general public passing through said alley and over and upon the same, far exceeded the travel on either ‘B’ or ‘C’ Street between First and Second Street during all the times hereinbefore mentioned,”

upon the ground that said proposition is not supported by the evidence.

36. Defendants except to Conclusion of Law No. 1, which reads as follows:

“That said Burkhart Alley in the month of October, 1908, became and ever since has been and now is a public thoroughfare or alley by reason of an implied dedication arising from the acts of the owners of Lots Nos. 7 and 8 and Lots Nos. 25 and 26, in Block No. 7 in the Town of Cordova,”

upon the ground that said conclusion of law is not supported by the evidence or findings.

37. Defendants except to Conclusion of Law No. 2 upon the ground that said conclusion of law is not supported by the findings or evidence.

38. Defendants except to that part of Conclusion of Law No. 2, which reads as follows: [317]

“That said Burkhart Alley as described in the foregoing findings of fact, was at the time when said defendants attempted to obstruct and

close a portion of said alley, to wit: On the 8th day of August, 1919, and the 10th day of September, 1919, was, and ever since has been and now is a public thoroughfare and alley by prescription,”

upon the ground that said conclusion of law is not supported by the findings of fact or by the evidence.

39. Defendants except to Conclusion of Law No. 3 upon the ground that same is not supported by the findings of fact, or evidence.

40. Defendants except to that part of Conclusion of Law No. 4, which reads as follows:

“That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or closing said Burkhart Alley as described in the foregoing findings of fact where the same passes upon and over Lots Nos. 7 and 8, in Block No. 7, in said Town of Cordova,”

upon the ground that said proposition is not supported by the findings of fact, or by the evidence.

41. Defendants except to Conclusion of Law No. 4 upon the ground that the proposition of law therein stated is not supported by the findings of fact, or by the evidence.

42. Defendants except to Conclusion of Law No. 5, or the order contained in paragraph No. 5 of said Conclusions of Law, if same is intended as an order, upon the ground that same is not supported by the

findings of fact, conclusions of law or by the evidence.

B. O. GRAHAM,
EDWARD F. MEDLEY,
Attorneys for Defendants. [318]

Order Allowing Exceptions.

On this 26th day of May, 1919, at the time the Findings of Fact and Conclusions of Law in the above-entitled suit were presented to the Court, the defendants duly and regularly objected to the findings and parts of findings specified in the foregoing and attached exceptions, upon the grounds therein respectively assigned, and the Court, after considering such objections, overruled each and every one thereof, to each and every one of which rulings the defendants thereupon excepted; and,

At the same time, the defendants objected to the Conclusions of Law and to the parts of such conclusions specified in the foregoing and attached exceptions, upon the grounds therein respectively assigned, and the Court, after considering such objections, overruled each and every one thereof, to each and every one of which rulings the defendants thereupon excepted.

THEREFORE, IT IS ORDERED, that each and every one of said exceptions to such findings and to the parts thereof so specified and each and every one of said exceptions to such conclusions and to the parts thereof so specified, and that each and every one of said rulings and defendants' said exceptions thereto, be, and the same hereby are al-

lowed and made a part of the record in this cause.

DONE IN OPEN COURT, at Valdez, Alaska,
this 26th day of May, 1919.

CHARLES E. BUNNELL.

District Judge.

Filed in the District Court, Territory of Alaska,
Third Division. May 26, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy. [319]

Filed in the District Court, Territory of Alaska,
Third Division. May 26, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

**Order Extending the Time Within Which
Defendants may Prepare, File and Serve Bill
of Exceptions.**

Upon application of the defendants H. A. Slater
and Bank of Alaska, by their attorneys of record
in the above-entitled suit,—

IT IS ORDERED, that the time within which the defendants may prepare, file and serve bill of exceptions in the above-entitled suit, be, and such time hereby is extended to and including the 20th day of August, 1920.

DONE IN OPEN COURT, at Valdez, Alaska, this 26th day of May, 1920.

CHARLES E. BUNNELL,
Judge of the District Court.

Service of the foregoing order by receipt of a true copy thereof is hereby accepted and admitted this 26th day of May, 1920.

DONOHOE & DIMOND,
By ANTHONY J. DIMOND,
Attorneys for Plaintiffs.

Entered Court Journal No. 12, page No. 814.
[320]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

**Order Settling and Certifying Bill of Exceptions and
for Transmission of Original Exhibits.**

The above-named defendants, having prepared

and filed in the above-entitled court and cause their proposed bill of exceptions to be used on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and having served the same on the plaintiffs, and the time allowed for preparing, serving and filing amendments thereto having expired and plaintiffs having failed to serve or file any amendments or objections to said proposed bill of exceptions, and it appearing to the Court that said bill of exceptions is in proper form and contains a full, true and correct copy of all the proceedings of the said trial and of the testimony and evidence and all of the same upon which said cause was tried and final decree entered therein, and the Court being fully advised in the premises,—[321]

IT IS ORDERED: That the foregoing bill of exceptions, consisting of the transcript of the record of evidence and proceedings had at said trial certified by the official court stenographer, decision and opinion of the trial court, findings of fact and conclusions of law, defendants' exceptions to findings of fact and conclusions of law, order allowing exceptions, order enlarging time for filing and serving bill of exceptions to August 20, 1920, plaintiff's original exhibit "A," defendants' original exhibits 1, 2, 3, 4 and 5, and this order settling and certifying the defendants' bill of exceptions, be, and the same is allowed, approved, settled and made a part of the record of this cause and that said bill of exceptions be filed as a part of the record of this cause in the office of the clerk of this court, and that said bill of exceptions, consisting of the record,

files, papers, proceedings, transcript of testimony and the original exhibits aforesaid, constitute defendants' bill of exceptions on appeal of said cause to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED, that the clerk of this court transmit by registered United States mail, postpaid, to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, the six (6) original exhibits hereinbefore referred to, introduced upon the trial of said cause and marked Plaintiffs' Exhibit "A," Defendants' Exhibit 1, Defendants' Exhibit 2, Defendants' Exhibit 3, Defendants' Exhibit 4 and Defendants' Exhibit 5, respectively, for the use and inspection of said Appellate Court, and that the same be in same manner returned to the clerk of this court whenever said cause shall [322] have been finally determined in said Appellate Court.

IT IS HEREBY CERTIFIED, by the undersigned Judge, before whom said trial of said cause was had, that said bill of exceptions is and constitutes a full, true and correct copy of all the proceedings of the said trial and of the testimony and evidence, and all of the same, upon which said cause was tried and final decree entered therein, and, also, a full, true and correct copy of the decision and opinion of the trial court, of all findings of fact and conclusions of law made and entered in said cause, of all of defendants' exceptions thereto, of the order allowing such exceptions, and of the order

enlarging the same for filing and serving bill of exceptions to August 20, 1920.

Done, certified and signed in chambers, being the District Court for the Territory of Alaska, Third Division, on this 19th day of October, A. D. 1920, by the Judge of said court before whom trial of said cause was had.

CHARLES E. BUNNELL,
Judge. [323]

Filed in the District Court, Territory of Alaska, Third Division. Nov. 17, 1920. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,

Defendants.

Praeceptum for Transcript of Record.

Please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a copy of the record in the above-entitled cause as a return to the appeal heretofore taken and allowed the defendants to review the decree in said cause, which

record shall consist of the following files and records, to wit:

1. Amended complaint.
2. Answer to amended complaint.
3. Reply.
4. Decree entered May 26th, 1920.
5. Petition for appeal.
6. Assignment of errors.
7. Order approving bond and allowing appeal.
8. Original citation.
9. Proof of service of citation.
10. Original bond for costs on appeal.
11. Bill of exceptions with exhibits mentioned in the order settling and certifying same.
12. This praecipe. [324]

Dated this 16th day of November, 1920.

EDWARD F. MEDLEY,
B. O. GRAHAM,
Attorneys for Defendants. [325]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,
Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto annexed 325 pages, numbered from 1 to 325, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that the same is made in accordance with the praecipe filed herein by B. O. Graham and Edward F. Medley, attorneys for the defendants and plaintiffs in error.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and the cost thereof, amounting to \$23.55, was paid to me by Mr. B. O. Graham, one of the attorneys for defendants and plaintiffs in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 16th day of December, A. D. 1920.

[Seal]

ARTHUR LANG,

Clerk of the District Court for the Territory of
Alaska, Third Division. [326]

LATHROP BUILDING

SIDEWALK

SIDEWALK

FIRST

STREET

CROSSWALK

ST. HYDROEPT

SIDEWALK

SIDEWALK

6

BRANCH OF PLASTER BUILDING
LOT 8

BIENHART

SINTER BUILDING
LOT 7

6

ALLEY

BLOCK 7

Scale 20 feet to an inch.

24

ALICE JONASSEN PROPERTY
LOT 23

ALLEY

STAIRWAY
LOT 26
CARPENTER'S BUILDING

27

SIDEWALK

STREET LAMP

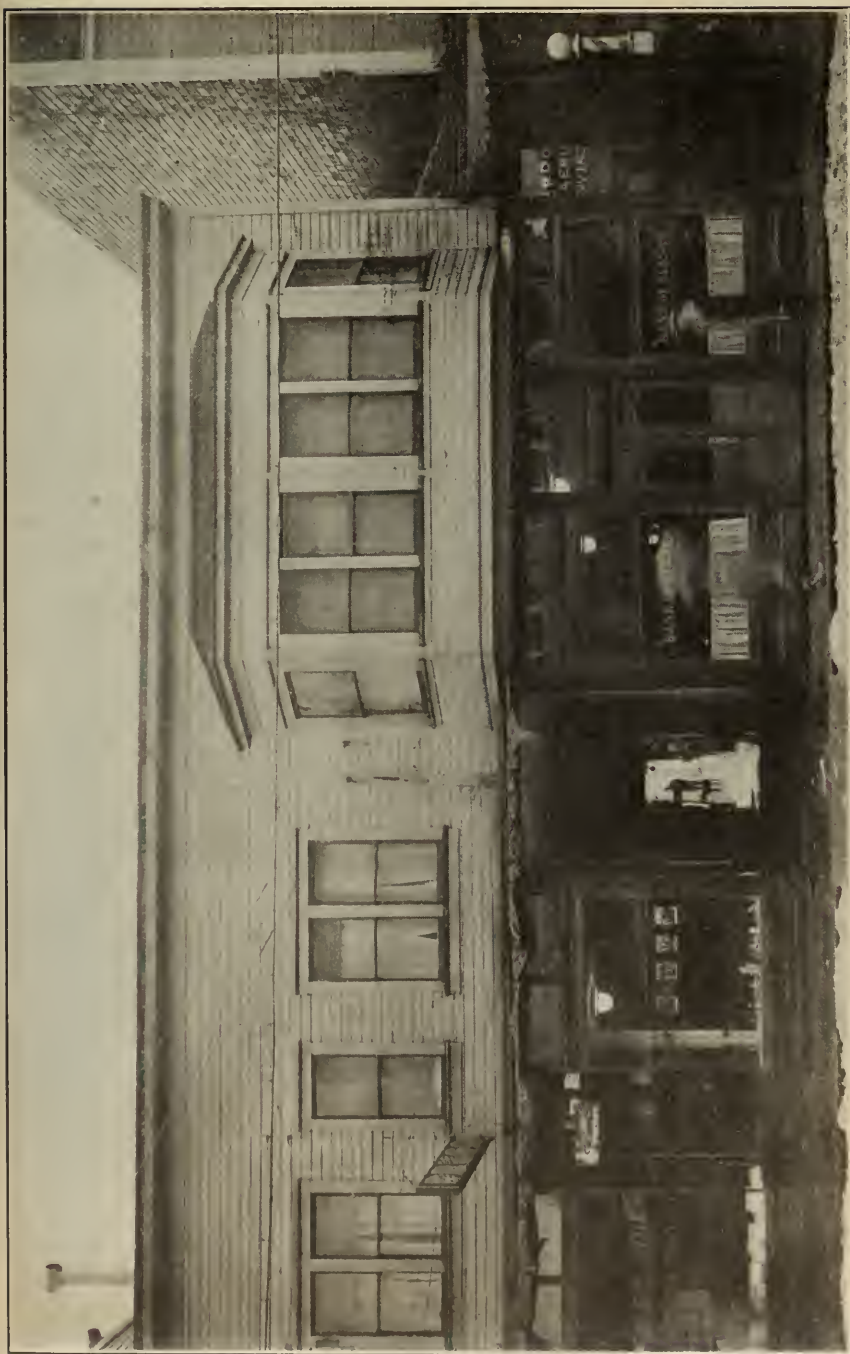
SECOND

STREET

ST. HYDROEPT

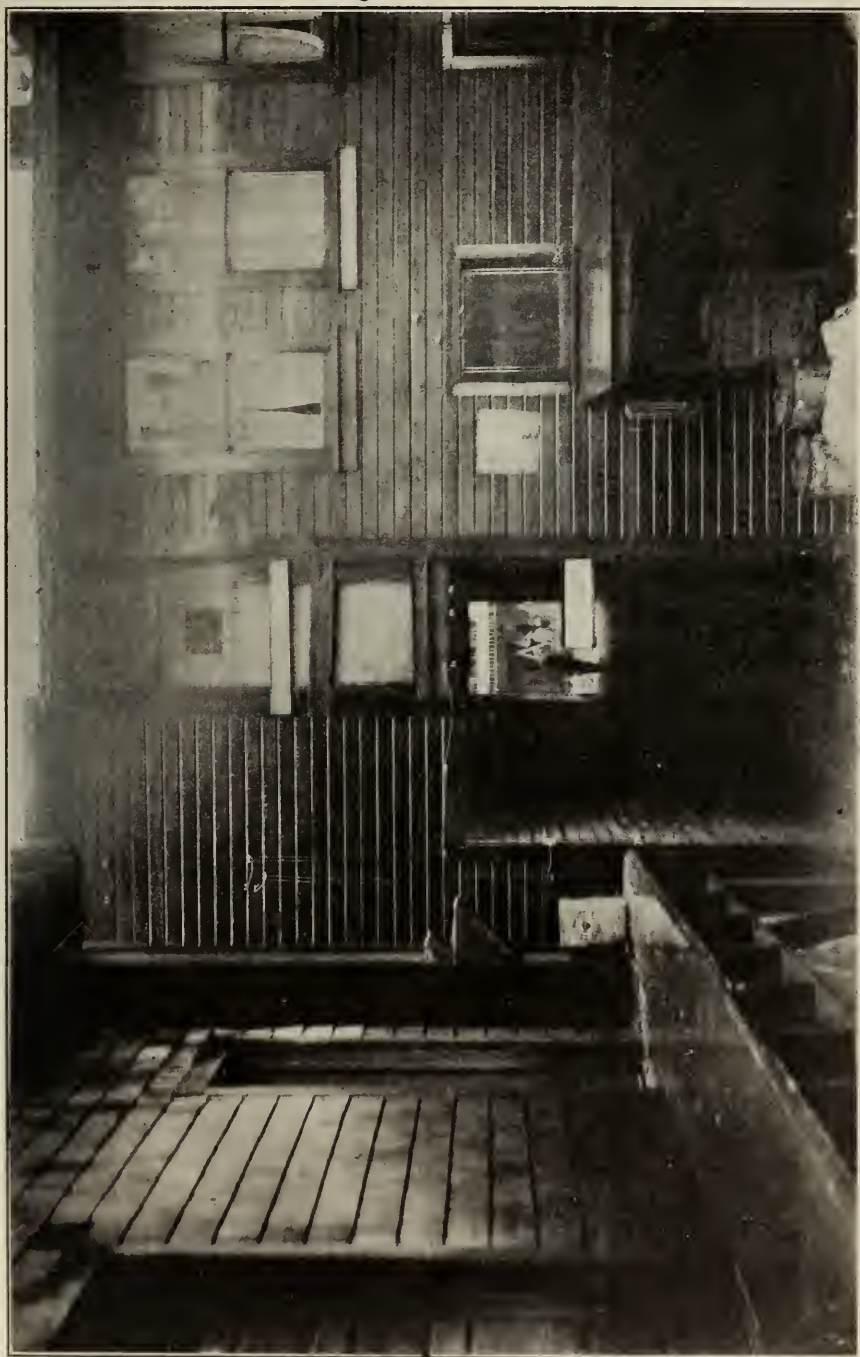
SIDEWALK

Defendants' Exhibit No. 1.



[Endorsed]: Defts. Identification #1. Defendant's Exhibit #1—Cause No. C-173. Filed in the District Court, Territory of Alaska, Third Division. Dec. 12, 1919. Arthur Lang, Clerk. By John B. Miller, Deputy.

Defendants' Exhibit No. 2.



[Endorsed]: Defts. Identification #2-C—173. Defendants' Exhibit #2—Cause No. C-173. Filed in the District Court, Territory of Alaska, Third Division. Dec. 12, 1919. Arthur Lang, Clerk. By John B. Miller, Deputy.

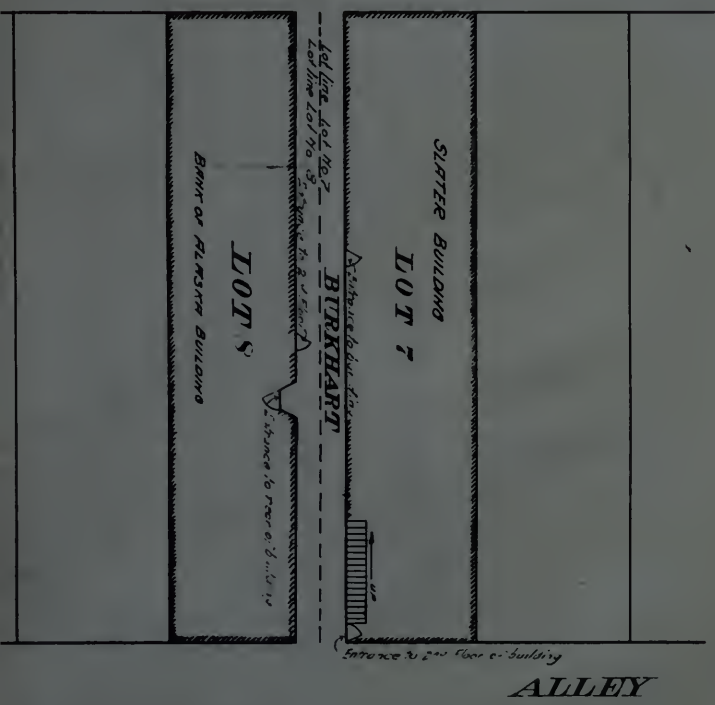
Scale 20 feet to an inch

BLOCK



STREET

FIRST



I, R. H. L. Niska, United States Commissioner in and for the Territory of Alaska, Third Division, Cordova Precinct, and ex-officio Recorder of the Cordova Recording District, Alaska, do hereby certify that I have carefully compared the annexed and foregoing document with the original record in Book 1 of the said District, thereof, in the office of said Recorder at Cordova, Alaska, and that the same is a true and complete copy of said record.

Witness my hand and official seal this 10th day of December, 1914.

CORDOVA RECORDING DISTRICT
ALASKA

Surveyed by A.J. Adams. US Dep Surveyor
Scale. 1 inch = 100 feet

DEDICATION

[illegible]

WITNESS My hand and seal this 80th day of May, 1908

Date in the presence of W. J. [illegible]

(Faint handwritten notes at the bottom of the page)

1. District of Alaska } 28

Before the aforesaid and in and for the District of Alaska duly con-

personally came George C. Marshall to me known to be the person in charge of the... of the... George C. Marshall, for 2000, and in Washington to...

the same 100% and voluntarily for the war and for the maintenance

Arch

DESCRIPTION

[illegible]

681

Crabapple
Pressure

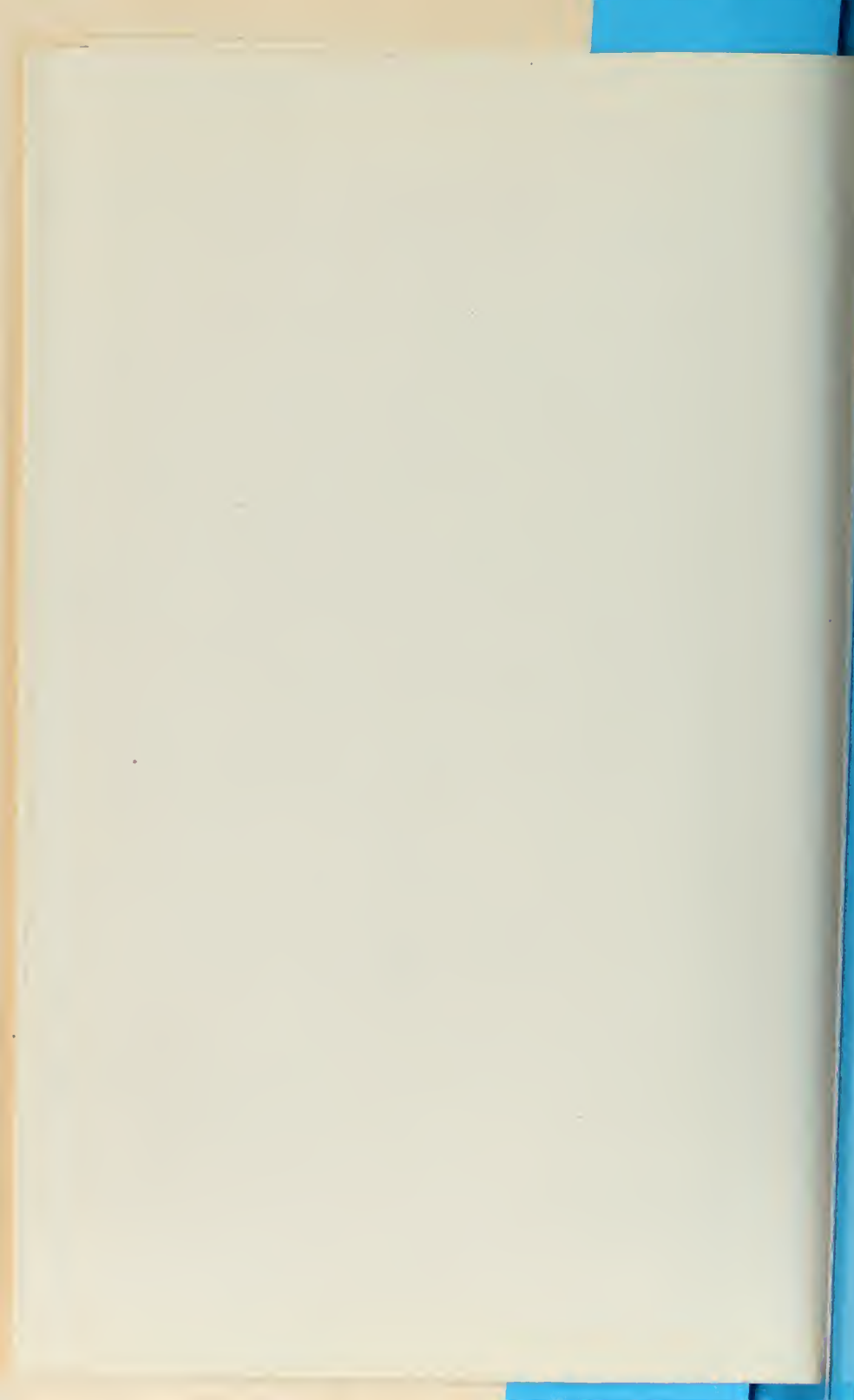
20. 1944

Let $V_n = 3n$.

FILED in the District Court

DEC 19 1919

[Handwritten signature]



MAP OF CORDOVA ALASKA

Scale Inch = 100 feet
SURVEYED BY A. JUDSON ADAMS
COMPILED IN 1910

THIS MAP IS AMENDATORY OF A
SUPPLEMENTAL TO THE ORIGINAL
PLAT OF THE TOWN OF CORDOVA
RECORDED IN THE OFFICE OF THE
RECORDS FOR THE CORDOVA PRE-
CINCT AT PAGE 10, BOOK 1 OF PLATS

DEDICATION

Know all men by these presents, that I, C. H. Hovick, Trustee under and by authority vested in me by a certain deed of Trust, made and executed on the 24th day of February 1908, and duly recorded in the office of the recorder in the Cordova recording precinct, Alaska, have caused the same to be laid out and platted on a part of a certain Cordova town lot in all that part or portion of U.S. Survey No. 448, not embraced in and made a part of the original plat of said town lot of Cordova, save and except that portion of said U.S. Survey No. 448 which is comprised in the Copper River Electric Company, containing thirteen acres more or less, situated at the north westerly corner of said survey No. 448. The plat hereon annexed and upon which this dedication is written is intended to be amendatory of and supplemental to the original plat of said town lot of Cordova now of record in the office of the recorder in the Cordova recording precinct in book 1 of plats and blue prints at page 10, and as it is designated in the Amended Plat of the Town of Cordova. I hereby dedicate to the public the amendment and upon which this dedication is written, to be used as public highways provided, however, and the dedication is made upon the express stipulation that I hereby reserve unto me and to my successors and assigns the sole and exclusive right and privilege of using said streets, avenues and ways, and the land covered thereby for the purpose of laying water pipes, conduits and water mains upon, in and through the same, and to own my water mains for private domestic use hereon. To lay gas pipes and other public purposes, and thereby to maintain and operate a water works system for supplying water to the public, and for private use; also upon the express stipulation that I hereby reserve unto myself, my successors and assigns the sole and exclusive right and privilege of using said streets, avenues and ways and the land covered thereby for the purpose of laying and maintaining upon, in and through the same, telegraph lines and electric light poles, and to construct, erect and maintain upon the same, even said streets, avenues and ways, wires and to conduct thereon and thereby electrically for light and power purposes and to maintain and operate thereon and thereby telephone and telegraph wires for public and private use. I also upon this express stipulation that I hereby reserve unto myself, my successors and assigns the sole and exclusive right and privilege of using said streets, avenues and ways and the land covered thereby for the purpose of erecting, building and laying thereon and operating in and over the same, poles, lines, cables, wires, cables and run over and upon the same other railway and power lines by means of cable, electric, steam or other motive power for public and private use. This dedication shall be in full effect the rights of any of the parties herein or of the future public have, reserved or enjoyed under the dedication of the original plat of said town lot of Cordova.

Witness my hand and seal this 17th day of August 1910
C. H. Hovick
Trustee

United States of America
District of Alaska

On this 17th day of August, A.D. 1910, before me, a notary public in and for the District of Alaska, personally appeared C. H. Hovick, Trustee, known to me to be the same person named in and who executed the within instrument, and acknowledged to me that he executed the same for the uses and purposes therein named.

Witness my hand and official seal this day of August 1910
Notary Public for Alaska

DESCRIPTION

The foregoing Amended Plat of the Town of Cordova, Alaska, embraces and contains all of U.S. Survey No. 448, save and except a parcel of thirteen acres more or less, as a tract to be described as follows: commencing at Cor. 1st, 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th, 101st, 102nd, 103rd, 104th, 105th, 106th, 107th, 108th, 109th, 110th, 111th, 112th, 113th, 114th, 115th, 116th, 117th, 118th, 119th, 120th, 121st, 122nd, 123rd, 124th, 125th, 126th, 127th, 128th, 129th, 130th, 131st, 132nd, 133rd, 134th, 135th, 136th, 137th, 138th, 139th, 140th, 141st, 142nd, 143rd, 144th, 145th, 146th, 147th, 148th, 149th, 150th, 151st, 152nd, 153rd, 154th, 155th, 156th, 157th, 158th, 159th, 160th, 161st, 162nd, 163rd, 164th, 165th, 166th, 167th, 168th, 169th, 170th, 171st, 172nd, 173rd, 174th, 175th, 176th, 177th, 178th, 179th, 180th, 181st, 182nd, 183rd, 184th, 185th, 186th, 187th, 188th, 189th, 190th, 191st, 192nd, 193rd, 194th, 195th, 196th, 197th, 198th, 199th, 200th, 201st, 202nd, 203rd, 204th, 205th, 206th, 207th, 208th, 209th, 210th, 211st, 212th, 213th, 214th, 215th, 216th, 217th, 218th, 219th, 220th, 221st, 222nd, 223rd, 224th, 225th, 226th, 227th, 228th, 229th, 230th, 231st, 232nd, 233rd, 234th, 235th, 236th, 237th, 238th, 239th, 240th, 241st, 242nd, 243rd, 244th, 245th, 246th, 247th, 248th, 249th, 250th, 251st, 252nd, 253rd, 254th, 255th, 256th, 257th, 258th, 259th, 260th, 261st, 262nd, 263rd, 264th, 265th, 266th, 267th, 268th, 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698th, 699th, 700th, 701st, 702nd, 703rd, 704th, 705th, 706th, 707th, 708th, 709th, 710th, 711st, 712th, 713th, 714th, 715th, 716th, 717th, 718th, 719th, 720th, 721st, 722nd, 723rd, 724th, 725th, 726th, 727th, 728th, 729th, 730th, 731st, 732nd, 733rd, 734th, 735th, 736th, 737th, 738th, 739th, 740th, 741st, 742nd, 743rd, 744th, 745th, 746th, 747th, 748th, 749th, 750th, 751st, 752nd, 753rd, 754th, 755th, 756th, 757th, 758th, 759th, 760th, 761st, 762nd, 763rd, 764th, 765th, 766th, 767th, 768th, 769th, 770th, 771st, 772nd, 773rd, 774th, 775th, 776th, 777th, 778th, 779th, 780th, 781st, 782nd, 783rd, 784th, 785th, 786th, 787th, 788th, 789th, 790th, 791st, 792nd, 793rd, 794th, 795th, 796th, 797th, 798th, 799th, 800th, 801st, 802nd, 803rd, 804th, 805th, 806th, 807th, 808th, 809th, 810th, 811st, 812th, 813th, 814th, 815th, 816th, 817th, 818th, 819th, 820th, 821st, 822nd, 823rd, 824th, 825th, 826th, 827th, 828th, 829th, 830th, 831st, 832nd, 833rd, 834th, 835th, 836th, 837th, 838th, 839th, 840th, 841st, 842nd, 843rd, 844th, 845th, 846th, 847th, 848th, 849th, 850th, 851st, 852nd, 853rd, 854th, 855th, 856th, 857th, 858th, 859th, 860th, 861st, 862nd, 863rd, 864th, 865th, 866th, 867th, 868th, 869th, 870th, 871st, 872nd, 873rd, 874th, 875th, 876th, 877th, 878th, 879th, 880th, 881st, 882nd, 883rd, 884th, 885th, 886th, 887th, 888th, 889th, 890th, 891st, 892nd, 893rd, 894th, 895th, 896th, 897th, 898th, 899th, 900th, 901st, 902nd, 903rd, 904th, 905th, 906th, 907th, 908th, 909th, 910th, 911st, 912th, 913th, 914th, 915th, 916th, 917th, 918th, 919th, 920th, 921st, 922nd, 923rd, 924th, 925th, 926th, 927th, 928th, 929th, 930th, 931st, 932nd, 933rd, 934th, 935th, 936th, 937th, 938th, 939th, 940th, 941st, 942nd, 943rd, 944th, 945th, 946th, 947th, 948th, 949th, 950th, 951st, 952nd, 953rd, 954th, 955th, 956th, 957th, 958th, 959th, 960th, 961st, 962nd, 963rd, 964th, 965th, 966th, 967th, 968th, 969th, 970th, 971st, 972nd, 973rd, 974th, 975th, 976th, 977th, 978th, 979th, 980th, 981st, 982nd, 983rd, 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[Endorsed]: No. 3626. United States Circuit Court of Appeals for the Ninth Circuit. H. A. Slater and Bank of Alaska, a Corporation, Appellants, vs. A. E. Lathrop and Alice Johnson, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filed January 5, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

3626.

H. A. SLATER et al.,

Appellants,

vs.

A. E. LATHROP et al.,

Appellees.

**Order Extending Time to and Including January 10,
1921, to File Record and Docket Cause.**

Pursuant to telegram hereto annexed, and good cause therefor appearing, it is ORDERED that the time to file record and docket the above-entitled cause in this court be extended to and including January 10, 1921.

Dated: San Francisco, California, November 24,
1920.

W. H. HUNT,
United States Circuit Judge.

[TELEGRAM.]

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Cordova Alaska 23

Clerk Monckton,
Circuit Court of Appeals,
San Francisco, Calif.

Donohue and Dimond, Attorneys for Appellees
in *H. A. Slater et al.*, Appellants, versus *A. E.
Lathrop et al.*, Appellees, undocketed, have signed
stipulation for order enlarging time to file record
and docket case to January tenth, nineteen twenty-
one. Please request court to enter order accord-
ingly. Wire result. Collect.

B. O. GRAHAM.

[Endorsed]: No. 3626. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Subdivision 1 of Rule 16 Enlarging Time to
and Including January 10, 1921, to File Record
and Docket Cause. Filed Nov. 24, 1920. F. D.
Monckton, Clerk. Refiled Jan. 5, 1921. F. D.
Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Appellants,

vs.

A. E. LATHROP and ALICE JOHNSON,

Appellees.

**Order Extending Time to and Including January 10,
1921, to File Record and Docket Cause.**

IT IS HEREBY STIPULATED AND
AGREED, that an order may be entered in the
United States Circuit Court of Appeals for the
Ninth Circuit, enlarging the time within which the
record on appeal from the District Court for the
Territory of Alaska, Third Division, may be filed
and the above-entitled cause may be docketed in
the United States Circuit Court of Appeals for the
Ninth Circuit until and including the 10th day of
January, 1921.

Dated at Cordova, Alaska, this 19th day of Novem-
ber, 1920.

EDWARD F. MEDLEY,

B. O. GRAHAM,

Attorneys for Appellants.

DONOHUE & DIAMOND,

By T. J. DONOHUE,

Attorneys for Appellees.

[Endorsed]: No. 3626. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including January 10, 1921, to File Record and Docket Cause. Refiled Jan. 5, 1921. F. D. Monckton, Clerk. Filed Dec. 3, 1920. F. D. Monckton, Clerk.